Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1998

HAMILTON AMUSEMENT CENTER t/a VIDEO EXPRESS,
L.O.J., INC. t/a THE EMPORIUM,
PINCO, INC. t/a CAMELOT BOOK STORE, and
CRESCENDO BOOKS, INC. t/a CARNIVAL BOOKS,

Petitioners,

vs.

PETER VERNIERO, Attorney General for the State of New Jersey
and THE STATE OF NEW JERSEY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF NEW JERSEY

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a New Jersey statute which limits only sexually oriented businesses to two exterior signs, one sign excluding minors and the other an identification sign no larger than 40 square feet in size, is a content-based restriction invalid under strict scrutiny analysis?

2. Whether a New Jersey statute restricting the number and content of exterior signs on sexually oriented businesses may be sustained as content-neutral where there was no factual basis shown for a substantial governmental interest in the restriction before the state legislature or the trial court, and the legislative history of a "related" statute was first introduced on appeal?

3. Whether, if the New Jersey statute restricts only petitioners' commercial speech, it should be analyzed under this Court's intermediate scrutiny test?

4. Whether, if the New Jersey statute is analyzed under the intermediate scrutiny test, the state has met its burden of proving on the record that its interests in regulating petitioners' commercial speech are substantial; that the statute advances those interests in a direct and material way; and that the restrictions are reasonable under the circumstances?

5. Whether the New Jersey statute as interpreted by the State appellate courts to allow one "identification" sign upon sexually oriented businesses, which may relate information pertaining to the "general notion of the business in order to identify the business," is unconstitutionally vague.

PARENT AND SUBSIDIARY COMPANIES

Petitioners have no parent or subsidiary companies to be listed pursuant to Rule 29.6 of the Rules of this Court.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i
PARENT AND SUBSIDIARY COMPANIES iii
TABLE OF CONTENTS iv
TABLE OF CITED AUTHORITIES vi
OPINIONS AND ORDERS BELOW 1
JURISDICTION OF THIS COURT 2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2
STATEMENT OF THE CASE 3
REASONS FOR GRANTING CERTIORARI 6

POINT I

THE SUBJECT NEW JERSEY STATUTE IS A CONTENT-BASED RESTRICTION ON SPEECH AND SHOULD BE STRUCK DOWN UNDER STRICT SCRUTINY ANALYSIS 6

POINT II

COMMERCIAL SPEECH SHOULD BE ENTITLED TO THE FULL PROTECTION OF THE FIRST AMENDMENT . . . 14

POINT III

THE NEW JERSEY STATUTE FAILS TO SATISFY EVEN THE LESSER "INTERMEDIATE SCRUTINY" LEVEL OF FIRST AMENDMENT PROTECTION 19

POINT IV

THE NEW JERSEY STATUTE IS UNCONSTITUTIONALLY VAGUE 24

CONCLUSION 29

TABLE OF AUTHORITIES

CASES Page

Central Hudson Gas & Electric Corp. v. Public Service Com'n, 447 U.S. 557 (1980) 5, 15, 16, 17, 19, 20, 21, 22, 29

City of Cincinnati v. Discount Network, Inc., 507 U.S. 410 (1993) 16, 21

City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986) 8, 9, 10, 11, 12, 14, 29

Coates v. Cincinnati, 402 U.S. 611 (1971) 24, 26

Edenfield v. Fane, 507 U.S. 761 (1993) 20, 21

Florida Bar v. Went For It, Inc., 515 U.S. 618 (1995) 19, 22

44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996) 7, 16, 22, 23

Grayned v. Rockford, 408 U.S. 104 (1972) 25

Greater New Orleans Broadcasting Ass'n v. United States, 149 F.3d 334 (5th Cir), petition for cert. filed, 67 U.S.L.W. 3177 (U.S. Sept. 2, 1998) 18

Hamilton Amusement Center v. Verniero,
298 N.J. Super. 230, 689 A.2d 201
(App.Div.), aff'd, 156 N.J. 254,
716 A.2d 1137 (1998) 1, 2

Metromedia, Inc. v. City of San Diego,
453 U.S. 490 (1981) 21

Mitchell v. Com'n on Adult Entertainment
Establishments, 10 F.3d 123 (3d Cir. 1993) 11

National Amusements, Inc. v. Dedham, 43F.3d
731 (1st Cir.), cert. denied, 515 U.S. 1103
(1995) 10

Phillips v. Borough of Keyport,
107 F.3d 164 (3d Cir.), cert. denied,
-- U.S. --, 118 S.Ct. 336 (1997) 8, 11

Posadas de Puerto Rico Assocs. v. Tourism Co.,
478 U.S. 328 (1986) 22

R.A.V. v. City of St. Paul, 505
U.S. 377 (1992) 29

Reno v. American Civil Liberties Union,
-- U.S. --, 117 S.Ct. 2329 (1997) 7, 27

Rubin v. Coors Brewing Co., 514 U.S. 476
(1995) 20

Sable Communications of California, Inc.
v. F.C.C.,
492 U.S. 115 (1989) 7

SDJ, Inc. v. City of Houston, 837 F.2d 1268, (5th Cir. 1988) 10

Smith v. Goguen, 415 U.S. 566 (1974) 25, 28

Tollis, Inc. v. San Bernadino County, 827 F.2d 1329, 1333 (9th Cir. 1987) 10

Turner Broadcasting System, Inc. v. F.C.C., 512 U.S. 622 (1994) 7, 8

United Reporting Public Corp. v. California Highway Patrol, 146 F.3d 1133 (9th Cir. 1998) 18, 21

Valentine v. Chrestensen, 316 U.S. 52 (1942) 15

Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976) 15

Ward v. Rock Against Racism, 491 U.S. 781 (1989) 8

STATUTES AND RULES

28 U.S.C. §1257(a) 2

N.J.S.A. section 2C:33-12.2 . . . . . 5, 13, 14, 20

N.J.S.A. section 2C:34-2.3c 1

N.J.S.A. section 2C:34-7c 1, 3, 4, 5, 6, 8, 13, 14, 15, 20, 22, 24, 27, 29

N.J.S.A. section 2C:34-7d 3,4

United States Supreme Court Rule 13 2

United States Supreme Court Rule 29.6 iii

CONSTITUTIONS

New Jersey Constitution, Article I, paragraph 6 3

United States Constitution,
First Amendment 2, 4, 7, 10, 14, 15, 16, 18, 19, 20, 23, 25, 27, 28

United States Constitution,
Fourteenth Amendment 4

ARTICLES

Kozinski, "Who's Afraid of Commercial Speech," 76 Virginia Law Review 627 (1996) 17

Walsh,Brody & DeVore, "'Central Hudson' Test: A Failed Premise," 22 New York Law Journal, 2 (August 13, 1998) 17

OPINIONS AND ORDERS BELOW

On October 27, 1995, the Superior Court of New Jersey, Law Division-Mercer County, issued an Amended Opinion holding that New Jersey Statutes Annotated section 2C:34-7c, amending New Jersey Statutes Annotated 2C:34-2.3c, was unconstitutional; enforcement of the statute was to be permanently enjoined. That decision has not been reported, but is reproduced in the Appendix at pages A-83 to A-102. On December 19, 1995, that court issues its final judgment declaring that New Jersey Statutes Annotated 2C:34-2.3c was unconstitutional and permanently enjoined its enforcement. That judgment is reproduced in the Appendix at pages A-80 to A-82.

On February 28, 1997, the Supreme Court of New Jersey, Appellate Division, issued an Opinion reversing the Law Division, holding that New Jersey Statutes Annotated 2C:34-7c was a valid regulation of commercial speech; the lower court's permanent injunction was vacated. That Opinion has been reported at 298 N.J. Super. 230, 689A.2d 201, and is reproduced in the Appendix at pages A-64 to A-82, infra.

On July 21, 1998, the Supreme Court of New Jersey issued an Opinion affirming the Opinion of the Appellate Division, and upholding the constitutionality of New Jersey Statutes Annotated 2C:34-7c. That Opinion is reported at

156 N.J. 254, 716 A.2d 1137, and is reproduced in the Appendix at pages A-2 to A-63, infra.

On October 7, 1998, the Supreme Court of New Jersey filed an Order denying petitioners' motion for reconsideration of its Opinion of July 21, 1998. That Order is reproduced in the Appendix at page A-1, infra.

JURISDICTION OF THIS COURT

The Order of the Supreme Court of New Jersey denying petitioners' motion for reconsideration of the Opinion of that court was filed on October 7, 1998 (A-1). Jurisdiction of United States Supreme Court is invoked pursuant to 28 U.S.C. §1257(a) and Rule 13 of the Rules of this Court, as a final judgment reviewed by the highest court of New Jersey in which review could be had.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment I

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

New Jersey Constitution, Article I, paragraph 6

> Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or of the press.

New Jersey Statutes Annotated [hereinafter "N.J.S.A."] section 2C:34-7c

> No sexually oriented business shall display more than two exterior signs, consisting of one identification sign and one sign giving notice that the premises are off limits to minors. The identification sign shall be no more than 40 square feet in size.

N.J.S.A. section 2C:34-7d

> A person who violates this section is guilty of a crime of the fourth degree.

STATEMENT OF THE CASE

This case involves the constitutionality of N.J.S.A. 2C:34-7c, which amended New Jersey law to prohibit sexually oriented businesses in that state from displaying more than two exterior signs. Those signs are further limited to one sign giving notice that the premises are off limits to minors, and one identification[1] sign a maximum of 40 square

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[1]The term "identification sign" is not statutorily defined.

feet in size. A violation of this statute is punishable as a crime of the fourth degree (N.J.S.A. 2C:34-7d).

Petitioners, retail establishments in the State of New Jersey which operate bookstores or video stores selling non-obscene, sexually-oriented material, commenced this action in the State Superior Court seeking declaratory and permanent injunctive relief against enforcement of the exterior sign law. Petitioners challenged said restrictions, inter alia, as violating their freedom of speech rights under the First and Fourteenth Amendments to the United States Constitution, as well as the corresponding provisions of the New Jersey Constitution (A-103 to A-115).

The Superior Court, Law Division, while reviewing both federal and state precedents, decided that the subject statute was unconstitutional under Article I, paragraph 6 of the New Jersey Constitution. The court held that N.J.S.A. 2C:34-7c proscribed all messages except identification and exclusion of minors. It was therefore content-based and presumptively unconstitutional; the state failed to demonstrate a compelling interest for its enactment or that the law was narrowly tailored (A-102). Moreover, there were insufficient findings in the legislative history to demonstrate that signs at sexually oriented businesses pose a significant traffic hazard or concerned the health and welfare of minors (A-97 to A-

98). The state was permanently enjoined from enforcement thereof (A-82).

The Appellate Division of the Superior Court of New Jersey [the "Appellate Division"] reversed, holding that N.J.S.A. 2C:34-7c applied only to "commercial speech," and "passed constitutional muster" (A-67) under the intermediate scrutiny standard. For the first time on appeal the state, over petitioners' objection, introduced the legislative history of a sister statute (N.J.S.A. 2C:33-12.2) concerning protected secondary effects of adult businesses (A-21). The term "identification sign" was construed to allow not only the business' name, but the street number, telephone number, operating hours and general nature of the business as well, and therefore was held not to be vague (A-79).

The New Jersey Supreme Court granted certification of petitioners' appeal, and affirmed. That court ruled that N.J.S.A. 2C:34-7c was content-neutral (A-13), and upheld it as a valid restriction on commercial speech under this Court's intermediate scrutiny standard[2] (A-8 to A-32). On the state's request, the court below took judicial notice of the legislative history of the sister statute N.J.S.A. 2C:33-12.2, although it was not before the trial court (A-21). Moreover,

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[2]Central Hudson Gas & Elec. Corp. v. Public Service Com'n, 447 U.S. 557 (1980).

the State Supreme Court accepted the Appellate Division's "judicial surgery" on N.J.S.A. 2C:34-7c in construing "identification sign" to allow additional information besides the name of the establishment (A-32 to A-34), and thus to uphold it against petitioners' vagueness challenge (A-37 to A-38).

Following that decision, the New Jersey Supreme Court denied petitioners' motion for reconsideration (A-1).

REASONS FOR GRANTING CERTIORARI

POINT I

THE SUBJECT NEW JERSEY STATUTE IS A CONTENT-BASED RESTRICTION ON SPEECH AND SHOULD BE STRUCK DOWN UNDER STRICT SCRUTINY ANALYSIS.

The trial court held that the subject statute, N.J.S.A. 2C:34-7c, is a content-based restriction on speech, invalid under strict scrutiny analysis (A-94, 102). However, the Appellate Division reversed, finding the statute to involve only commercial speech, and therefore not subject to strict scrutiny; it was held to satisfy the intermediate scrutiny standard (A-66 to A-67). The New Jersey Supreme Court affirmed, similarly applying the intermediate scrutiny test for commercial speech (A-13), and upholding the statute under

the First Amendment (A-42). Significantly, both appellate courts relied upon the legislative history of a sister statute which the state had not introduced before the trial court (A-21). As a result, petitioners were denied the ability to challenge or refute the accuracy or applicability of that legislative history.

It is settled law that indecent, non-obscene sexual expression is protected by the First Amendment, Reno v. American Civil Liberties Union, -- U.S. --, 117 S.Ct. 2329, 2346 (1997), and that the First Amendment was made applicable to the states by the Fourteenth Amendment, 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 516 (1996). Thus, the adult businesses at which the New Jersey restrictions are aimed come within the ambit of protected expression.

It is also well-established that governmental regulations which burden speech based upon the content of their expression are presumptively invalid and may survive constitutional challenge only if they promote a compelling state interest and employ the least restrictive means to further the articulated interests. See, Sable Communications of California, Inc. v. F.C.C., 492 U.S. 115, 126 (1989). This Court has specifically stated: "Our precedents ... apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech

because of its content. (Citations omitted)." Turner Broadcasting System, Inc. v. F.C.C., 512 U.S. 622, 642 (1994).

In determining whether a particular regulation is content-based, the government's purpose is the controlling consideration. Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989). However, the government's mere assertion of a content-neutral purpose is not enough to save a statute which, on its face, discriminates based upon content of speech. Turner Broadcasting, supra, 512 U.S. at 642. Furthier, it is the State of New Jersey which must bear the burden of proving that these requirements have been met in order to justify burdening free speech. City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 48 (1986); Phillips v. Borough of Keyport, 107 F.3d 164, 173 (3d Cir.), cert. denied, -- U.S. --, 118 S.Ct. 336 (1997).

Here, it is beyond dispute that on its face, N.J.S.A. 2C:34-7c applies only to "sexually oriented businesses." If that statute were truly content-neutral, it would be applicable to exterior signs located upon any New Jersey business establishment, rather than only those signs located at "adult" establishments.

The state may argue that the statute is content-neutral, because it is aimed primarily at the adverse secondary effects on surrounding neighborhoods allegedly caused by sexually

oriented businesses, such as increased crime and decreased property values, rather than the content of the speech which is being regulated. This was the rationale of the New Jersey Supreme Court (A-13). If content-neutral, the statute could then be reviewed under the lesser "time, place and manner" standard.

The seminal authority for that proposition is City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 47-49 (1986) [upholding city zoning ordinance regulating location of movie theaters showing adult films based on expected secondary effects]. However, Renton is inapposite herein. In Renton, the city placed a locational restriction on where a sexually-oriented business could engage in speech. However, the city did not attempt to regulate the specific content of that speech. Here, on the contrary, the State has regulated the petitioners' message. They are limited to two exterior signs, one of which is to inform minors that they are unwelcome on the premises, while the other is limited to "identification," and a maximum size of 40 square feet. Thus, unlike Renton, the content of petitioners' speech is directly restricted.

In Renton, this Court upheld the city's requisite showing of a substantial government interest in its restrictions on speech by its pre-enactment reliance on studies produced

by the City of Seattle showing the harmful secondary effects of adult uses, as well as other "detailed findings" (475 U.S. at 50-51). This Court wrote:

> The First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses. (475 U.S. at 51-52)

Thus, Renton clearly required the legislature to rely on some evidence before enacting the restrictions. Circuit courts have followed this mandate. See, e.g., National Amusements, Inc. v. Dedham, 43 F.3d 731, 742 (1st Cir.) [Legislature may rely upon "relevant" pre-enactment evidence], cert. denied, 515 U.S. 1103 (1995); SDJ, Inc. v. City of Houston, 837 F.2d 1268, 1274 (5th Cir. 1988) [Insisting on legislature's pre-enactment "objective evidence of purpose -- a study or findings"], cert. denied, 489 U.S. 1052 (1989).[3]

However, some courts have diluted the requirements that this Court set forth in Renton, allowing a government to first demonstrate factual evidence of purpose in a trial court

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[3]Accord, Tollis, Inc. v. San Bernadino County, 827 F.2d 1329, 1333 (9th Cir. 1987) [Requiring County to show in enacting restrictions on adult theater it relied upon evidence of harmful secondary effects].

when the subject statute is challenged. In Mitchell v. Com'n on Adult Entertainment Establishments, 10 F.3d 123 (3d Cir. 1993), the court sustained restrictions on adult stores based on both pre-enactment and trial court evidence. The court expressly declined to decide whether the doctrine of "legislative notice" could allow a statute to "pass without any pre-enactment evidence of need and purpose" (10 F.3d at 136).

More recently, in Phillips v. Borough of Keyport, 107 F.3d 164 (3d Cir. 1997) (en banc), cert. denied, ___ U.S. ___, 118 S.Ct. 336 (1997), the Third Circuit held that a lawful basis for a substantial government interest could be established in the trial court upon a statutory challenge without the need for a proper legislative record. The court declared that Renton did not require pre-enactment evidence of secondary effects (107 F.3d at 178). Thus, a conflict exists among the circuits which may only be resolved by this Court.

Petitioners submit that the state should be required to satisfy the pre-enactment evidence rule set forth in Renton. However, even if allowed to adduce additional evidence of studies at trial, here the state did not place any such studies in the record; "nor is there evidence that lawmakers relied on such studies" (A-17). Instead, in upholding the statute, the State Supreme Court cited three sources of the state's

purported substantial interest in regulating the signs of sexually oriented businesses (A-19). None of them, however, are sufficient.

First is a position report to the legislature by the Concerned Women for America. However, the State Supreme Court conceded that said report does not mention signage, or address traffic safety or harm to minors. Rather, it focuses on the herein irrelevant connection between sexually explicit material and violent crimes (A-20).

Second, the State Supreme Court referred to a floor speech by Assemblywoman Crecco, the bill's sponsor (A-20). This attempted justification is contrary to Renton's caution against reliance upon the statements of individual legislators as evidence of legislative intent (475 U.S. at 48). The text of the Crecco speech is contained in the dissenting opinion of Judge Stein. Only two of Crecco's statements have any relevance herein. These are:

> Sign restrictions would be advantageous because multiple signs distract motorists and cause accidents.
>
> * * *
>
> We need to put the brakes on these sorts of element [sic] in all municipalities in the State of New Jersey. Parents are concerned about their children being exposed to these types of

> perverted establishments and their sordid activities. (A-56)

The majority concedes that Crecco offered no evidentiary support for her contention (A-20). However, as noted by the dissent, the second statement about "perverted establishments" is clearly aimed at regulating content rather than controlling secondary effects (A-56).

Third, and in violation of normal appellate procedures, the state was surprisingly allowed to add to its meager trial court record by first introducing in the Appellate Division the legislative history of a separate statute, N.J.S.A. 2C:33-12.2, regulating adult businesses with private viewing booths (A-21). The State Supreme Court then took judicial notice of that statute's legislative history (A-21). The alleged purpose of that history was to show the state's interest in regulating the secondary effects of certain sexually oriented businesses (A-21). However, the dissent notes that the legislative history of 2C:33-12.2 does not demonstrate that the subject signage statute, 2C:34-7c, advances the state interest in traffic safety or protecting minors (A-58).[4]

In finding that the legislature enacted its sign restrictions on adult businesses with knowledge of the

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[4]It is conceded that no history exists to explain the state's 40 square feet limitation on sign size (A-31).

legislative history of 2C:33-12.2 (A-21), the State Supreme Court made a quantum leap in logic. The history of the latter statute was not included at trial (A-15). There has been no showing of statewide traffic problems or harm to minors created by multiple "identification" signs or signs exceeding 40 square feet at adult businesses. While there is case law allowing a legislature to supplement its pre-enactment showing of a substantial governmental interest at trial, supra, petitioners are unaware of any other authority allowing such a showing to be made for the first time on appeal, contrary to Renton.

The New Jersey Supreme Court found N.J.S.A. 2C:34-7c to be content-neutral, and therefore failed to apply a strict scrutiny analysis (A-13). That ruling should be reversed, and the statute invalidated. At a minimum, this matter should be remanded to the state courts for a proper legal analysis under First Amendment principles.

POINT II

COMMERCIAL SPEECH SHOULD BE ENTITLED TO THE FULL PROTECTION OF THE FIRST AMENDMENT.

In the principal part of its opinion below, the New Jersey Supreme Court purported to apply this Court's current test for commercial speech set forth in Central Hudson Gas

& Elec. Corp. v. Public Service Com'n, 447 U.S. 557 (1980) [A-11]. Under that "intermediate scrutiny" test, the state high court ultimately upheld N.J.S.A. 2C:34-7c (A-42). It is submitted that the intermediate scrutiny test of Central Hudson is no longer viable, and should be overruled in favor of a normal First Amendment analysis applicable to other lawful and non-misleading speech.

Historically, this Court once ruled that commercial speech was outside the protection of the United States Constitution. Valentine v. Chrestensen, 316 U.S. 52 (1942). That ruling did not survive the test of time, and in Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976) [striking a state statute prohibiting advertising of prescription drug prices], it was held that the First Amendment does protect commercial speech. However, that protection was deemed to be of a lesser value than other kinds of speech.

In its well-known Central Hudson decision, 447 U.S. 557, supra, this Court enunciated its current intermediate scrutiny test for commercial speech. Thus, for commercial speech to merit First Amendment protection, it must concern lawful activity and not be misleading. If those criteria are met, to regulate commercial speech the government must show a substantial interest in its restriction; that the regulation directly and materially advances the governmental

interest; and that the regulation is not more extensive than necessary (447 U.S. at 566).

This limited protection test has been controversial, both within and without the Court. For example, in his concurring opinion in City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410 (1993), Justice Blackmun urged the Court to abandon it in favor of full First Amendment protection:

> I hope the Court ultimately will come to abandon Central Hudson's analysis entirely in favor of one that affords full protection for truthful, non-coercive commercial speech about lawful activities. (507 U.S. at 438)

More recently, in 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996), this Court's last major commercial speech decision produced four separate written opinions, none of them commanding a majority. In that decision striking a restriction on liquor advertising, Justice Thomas flatly stated: "I do not see a philosophical or historical basis for asserting that 'commercial' speech is of 'lower value' than 'non-commercial' speech" (517 U.S. at 522; Thomas, J., concurring).[5]

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[5]Justice Scalia's concurrence expressly shared Justice Thomas' "discomfort" with Central Hudson's intermediate scrutiny test (517 U.S. at 517).

Similarly, Justice Stevens, writing for himself and Justices Kennedy and Ginsburg, indicated that bans on "truthful non-commercial commercial speech ... usually rest solely on the offensive assumption that the public will respond 'irrationally' to the truth." (517 U.S. at 503).

Various commentators and lower courts have similarly written. In his well-known article on the subject, Ninth Circuit Judge Alex Kozinski urged in "Who's Afraid of Commercial Speech," 76 Virginia Law Review 627 (1990), that the commercial speech doctrine be discarded. Judge Kozinski wrote:

> If we treat speech as speech, commercial or not, we fall back on standard content-neutral analysis: Government regulation is constitutional where it furthers an important governmental interest, the governmental interest is unrelated to the suppression of free expression, and the restriction on expression is no greater than necessary. (76 Virginia Law Review at 651)

Accord, Walsh, Brody & DeVore, "'Central Hudson' Test: a Failed Promise," 22 New York Law Journal 2 (August 13, 1998) [urging full First Amendment protection for lawful non-misleading commercial speech; finding it "astonishing" that commercial speech is less protected than the "rantings of neo-Nazis" in Skokie].

A recent lower court opinion also raises this issue. In United Reporting Pub. Corp. v. California Highway Patrol, 146 F.3d 1133 (9th Cir. 1998), the court declared:

> The current debate centers not on whether commercial speech is a form of expression entitled to constitutional protection, but on the validity of the distinction between commercial and non-commercial speech. (Citations omitted). (146 F.3d at 1136)[6]

There is no convincing rationale for treating commercial speech as the "stepchild" of protected free expression. Moreover, the distinction affords government a tool to abridge unpopular speech on the basis of being pigeonholed as "commercial"; certainly the potential for abuse is readily apparent. This Court is requested to grant certiorari in this case to guide the lower courts, and to declare that commercial speech is no longer to be considered a disfavored form of protected expression under the First Amendment.

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[6] Cf. dissenting opinion of Chief Judge Politz in Greater New Orleans Broadcasting Ass'n v. United States, 149 F.3d 334, 341 (5th Cir.) [urging the Court to provide guidance in the constitutional review of commercial speech], petition for cert. filed, 67 U.S.L.W. 3177 (U.S. Sept. 2, 1998) (No. 98-387).

POINT III

THE NEW JERSEY STATUTE FAILS TO SATISFY THE LESSER "INTERMEDIATE SCRUTINY" LEVEL OF FIRST AMENDMENT PROTECTION.

If this Court should decline to revisit the theoretical underpinnings of commercial speech protection, then the analysis first set forth in Central Hudson Gas & Elec. Corp. v. Public Service Com'n, 447 U.S. 557 (1980), would continue to govern. That decision articulated a multi-factor "intermediate scrutiny"[7] test to determine whether a governmental regulation of commercial speech satisfies the First Amendment:

> For commercial speech to come within [the First Amendment], it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest. (447 U.S. at 566)

The subject statute cannot survive this analysis.

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[7]Florida Bar v. Went For It, Inc., 515 U.S. 618, 623 (1995).

As to the first factor, the New Jersey Supreme Court conceded that petitioners' advertising is not misleading, and does not involve unlawful activity or obscenity (A-14 to A-15). Thus, petitioners pass the threshold test; their speech is entitled to First Amendment protection. (Id.).

The second Central Hudson prong requires the state to demonstrate a "substantial interest" in support of its regulation of commercial speech, with the government having the burden of proving that interest. Rubin v. Coors Brewing Co., 514 U.S. 476, 487 (1995). Moreover, unlike the lesser rational basis standard, Central Hudson does not allow a court to "supplant the precise interests put forth by the state with other supposition." Edenfield v. Fane, 507 U.S. 761, 768 (1993). Thus, it will not suffice "if the stated interests are not the actual interests." (Id.).

At the trial court level, the state asserted that the signage restrictions of N.J.S.A. 2C:34-7c served the interests of traffic safety and the welfare of minors (A-15). On appeal, however, the state was allowed to introduce the legislative history of N.J.S.A. 2C:33-12.2 as to purported secondary effects of adult businesses (A-21). Nevertheless, as discussed in Point I, supra, the state has failed to satisfy its burden of demonstrating in the legislative or trial record a substantial interest in restricting petitioners' commercial speech.

The third Central Hudson prong is whether the restriction on commercial speech directly advances the government's asserted interests. As stated in Edenfield v. Fane, 507 U.S. 761 (1993), the government's burden cannot be satisfied by mere surmise or conjecture. Rather, the state must prove that "the harms it recites are real and that its restrictions will in fact alleviate them to a material degree" (507 U.S. at 771).

Here, the state has wholly failed to demonstrate that its restrictions on the signage of sexually oriented businesses will control the purported secondary effects thereof. The State Supreme Court's reference to Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981), for the proposition that increased traffic safety could be achieved by limiting advertising signs (A-25) is spurious. If that were the state's true purpose, it would limit signage on all businesses, not just sexually oriented businesses. See, City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410 (1993) [striking ordinance where alleged secondary effects of newsracks with commercial handbills were no worse than newsracks with newspapers]; United Reporting Pub. Corp. v. California Highway Patrol, 146 F.3d 1133 (9th Cir. 1998) [striking statute under Central Hudson test where numerous exceptions to restrictions resulted in ineffective support for government's purpose].

The final Central Hudson prong is whether the government regulation of commercial speech goes too far and is more extensive than necessary to serve the state's asserted interests in the regulation.

This Court now requires "a 'fit' between the legislature's ends and the means chosen to accomplish those ends ...." Florida Bar v. Went For It, Inc., 515 U.S. 618, 632 (1995). Moreover, the great deference which this Court formerly accorded to a state's legislative determination that its restrictions on commercial speech would be effective without unduly burdening speech[8] is no longer good law. As set forth in Justice O'Connor's concurrence in 44 Liquormart, Inc. v. United States, 517 U.S. 484 (1996):

> The closer look that we have required since Posadas comports better with the purpose of the analysis set out in Central Hudson, by requiring the State to show that the speech restriction directly advances its interest and is narrowly tailored. (517 U.S. at 531-32; O'Connor, J., concurring)

Here, N.J.S.A. 2C:34-7c is not narrowly tailored. It attempts to regulate statewide what is clearly a local issue -- signage on a business. Such signs present problems, if at all, to municipalities, and do not require a statewide solution.

---

[8]E.g., Posadas de Puerto Rico Assocs. v. Tourism Co., 478 U.S. 328, 341-44 (1986).

Nor has the state offered any evidence to justify legislation on so broad a scale.

Certainly a small village in New Jersey may have traffic problems -- as well as alleged potential secondary effects -- of a different kind and magnitude than the Atlantic City gambling casino area. Municipal limitations on signs in the former case may well be reasonable. However, adult businesses in the latter area must compete with other purveyors of entertainment and their extensive advertising. To enact a statewide limitation on the signage of sexually-oriented businesses is unjustified by legitimate First Amendment concerns.

This is particularly seen in the limitation on the size of a single identification sign to 40 square feet, which even the State Supreme court agreed had no legislative history (A-31). The Court's rationale for approving that size limitation was based on "legislative discretion" (A-31). However, as set forth above, at least since 44 Liquormart such deference to the legislature is no longer authorized in the commercial speech area.

The state has failed to meet its burden of demonstrating that its restrictions on speech are no more extensive than necessary.

POINT IV

THE NEW JERSEY STATUTE IS UNCONSTITUTIONALLY VAGUE.

The trial court held that N.J.S.A. 2C:34-7c was void for vagueness, based on the fact that the word "identification" could mean more than name only (A-101). Subsequently, the Appellate Division's attempt to salvage the instant constitutionally infirm statute -- by "narrowly" construing it to permit "identification" signs which may relate information pertaining to the "general nature of the establishment in order to identify the business," and "temporary" political signs (A-78 to A-79) -- has exacerbated rather than alleviated its unconstitutional vagueness. The Supreme Court of New Jersey held that the statute as construed is sufficiently clear and gives adequate notice to sexually oriented businesses to withstand this pre-enforcement challenge (A-37). For the reasons set forth below, the Supreme Court of New Jersey's holding was erroneous and should be reversed.

A law is unconstitutional if its provisions are so vague and imprecise that persons of ordinary intelligence must guess at its meaning and differ as to its application. Coates v. Cincinnati, 402 U.S. 611, 614 (1971). This rule stems from the theory that an average person must be given a

"reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning." Grayned v. Rockford, 408 U.S. 104, 108 (1972). Of tantamount importance is the prevention of arbitrary and discriminatory enforcement; to prevent this, laws must provide explicit standards for those who apply them. Grayned, supra.

Moreover, when a vague statute touches protected First Amendment expression, as in the instant case, the vagueness doctrine "demands a greater degree of specificity than in other contexts." Smith v. Goguen, 415 U.S. 566, 573 (1974). Here, the Appellate Division interpreted the term "identification" to include information relating to the "general nature of the business" (A-79), but neither the statute nor the court's decision defines that phrase.

The Supreme Court of New Jersey also failed to define the term "identification," or the phrase "general nature of the business." In attempting to interpret the latter, that court held that the phrase allows an establishment to advertise that it is a sexually oriented business and that it sells such products to adults (A-38). However, if the court's construction of the statute is to be read as having any meaning, then some types of information are not permitted to appear on "identification" signs, such as information which is "specific" or communicates information pertaining

to the "specific nature of the establishment." Nevertheless, the court offered absolutely no guidance as to whether "identification" signs may contain pictures, drawings or "specific" terms such as the product lines which are sold (e.g., types of books, magazines and/or videotapes).

Similarly, the State Supreme Court attempted to define "temporary political sign," since the Appellate Division had failed to specify the length of time that a posting is deemed to be "temporary," or to interpret "political sign." The court held that a person of average intelligence would understand "temporary political signs" to include signs that are "not permanently affixed to the establishment's property," and that "speak to matters relating to the activities of the government, a politician, a political party or a political issue" (A-38). However, the court still failed to specify the length of time that a posting is deemed to be "temporary" as opposed to permanent (e.g., one day, week, month and/or year), or to adequately describe the meaning of "temporary political sign."

The state court's ambiguous interpretation of the statute runs afoul of the requirement that persons of ordinary intelligence may not be made to guess at the meaning of the statutes, especially those with penal sanctions. Coates v. Cincinnati, 402 U.S. 611 (1971). Consequently, N.J.S.A. 2C:34-7c lacks the precision that the First Amendment

requires when a statute regulates the content of speech. The lack of objective standards places petitioners and other citizens in the position of not knowing what speech is proscribed by this statute, creating a chilling effect on free speech. In addition, since the statute calls for criminal sanctions, the fear of punishment may cause speakers to remain silent rather than communicate even arguably unlawful words, ideas and images. Reno v. American Civil Liberties Union, ___ U.S. ___, 117 S.Ct. 2329, 2332 (1997).

By failing to provide citizens or law enforcement officials with sufficient guidance in determining what types of information may be communicated upon "identification" signs, the New Jersey Supreme Court has effectively authorized every law enforcement officer in the state to act as a *de facto* legislator. Each officer may determine what types of information may be included on signs on an *ad hoc* basis, thereby depriving the individual against whom the law is enforced of reasonable notice of the scope of the application of the law, as well as creating the potential for erratic enforcement. For example, if a law enforcement official has a personal dislike of adult businesses, he may determine that a sign which states that the store sells "magazines, books and videotapes" is too specific in nature. A different law enforcement officer, however, may conclude

that such signs are sufficiently general in nature because they do not include titles or product lines.

Thus, each store's employees, managers and owners must correctly anticipate, under pain of arrest, the interpretation of the statute which will be made by every law enforcement officer. Similarly, each officer is free to determine his or her own definition of a "temporary political sign." One law enforcement officer may be offended by signs which state: "make love, not war," "condoms are cool," or "sex is good, not bad," and decide that they do not constitute "political" speech and are, therefore, prohibited by the statute. Further, even if the officer deems the sign to be "political," he can arbitrarily determine how long it can be posted before he decides that it is no longer "temporary." In Smith v. Goguen, 415 U.S. 566, 575 (1974), this Court specifically warned against statutes which permit "a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections."

Clearly, under the interpretation offered by the New Jersey Supreme Court, law enforcement officials are permitted to interpret and enforce the statute at their whim. Such arbitrary power cannot be tolerated in the First Amendment arena, especially when penal sanctions apply. Therefore, N.J.S.A. 2C:34-7c, must be declared void for vagueness.

CONCLUSION

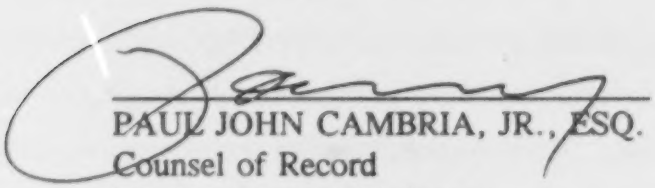
This Court should not tolerate the New Jersey appellate courts' attempts to eviscerate the Renton requirement that a government attempting to regulate speech must have pre-enactment evidence in support of the constitutionality of its actions.

This Court is urged to reconsider the unsettled state of the law concerning the legal test for restrictions on so-called commercial speech, and to eliminate the distinction between it and other forms of speech. In short, content-based restrictions on commercial speech should be presumptively invalid, as they are for other forms of protected speech. R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992).

If this Court declines to re-examine this area, it should nevertheless strike the subject statute under the intermediate scrutiny test of Central Hudson, and the vagueness doctrine.

For the reasons set forth herein, petitioners respectfully request this Court to grant their petition for certiorari.

Respectfully submitted,



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Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

October Term, 1998

HAMILTON AMUSEMENT CENTER t/a VIDEO EXPRESS,
L.O.J., INC. t/a THE EMPORIUM,
PINCO, INC. t/a CAMELOT BOOK STORE, and
CRESCENDO BOOKS, INC. t/a CARNIVAL BOOKS,

Petitioners,

vs.

PETER VERNIERO, Attorney General for the State of New Jersey
and THE STATE OF NEW JERSEY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF NEW JERSEY

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

Page

ORDER of Supreme Court of New Jersey denying motion for reconsideration by plaintiffs-movants in Hamilton Amusement Center, etc., et al. v. Verniero, filed October 7, 1998 . . . . . A-1

OPINION of Supreme Court of New Jersey, affirming decision of Superior Court of New Jersey, Appellate Division, decided July 21, 1998 . . . . . A-2

OPINION of Superior Court of New Jersey, Appellate Division, reversing decision of Superior Court of New Jersey, Law Division - Mercer County, and vacating permanent injunction, decided February 28, 1997 . . . . . A-64

FINAL JUDGMENT of Superior Court of New Jersey, Law Division, Mercer County, declaring New Jersey statutes 2C:34-2.3c unconstitutional and permanently enjoining enforcement thereof, granted December 19, 1995 . . . . . A-80

AMENDED OPINION of Superior Court of New Jersey, Law Division - Mercer County, declaring New Jersey statutes 2C:34-7c unconstitutional and enjoining enforcement thereof, decided

October 27, 1995 . . . . . A-83

COMPLAINT for declaratory and injunctive
relief, certified September 13, 1995 . . . . . A-103

SUPREME COURT OF NEW JERSEY
M-128 September Term 1998
43,790

HAMILTON AMUSEMENT CENTER, etc., et al.,

Plaintiffs-Movants,

v.

PETER VERNIERO, etc., et al.,

Defendants-Respondents.

ORDER
FILED
Oct 7 1998
s/Stephen W. Townsend

This matter having been duly presented to the Court, it is ORDERED that the motion for reconsideration is denied.

WITNESS, the Honorable Deborah T. Poritz, Chief Justice, at Trenton, this 6th day of October, 1998.

I hereby certify that the foregoing is a true copy of the orignal on file in my office.
s/Stephen W. Townsend
Clerk of the Supreme Court of New Jersey

SUPREME COURT OF NEW JERSEY
A-64 September Term 1997

HAMILTON AMUSEMENT CENTER, t/a VIDEO EXPRESS, L.O.J., INC., t/a THE EMPORIUM, PYNCO, INC., t/a CAMELOT BOOK STORE and CRESCENDO BOOKS, INC., t/a CARNIVAL BOOKS,

Plaintiffs-Appellants,

v.

PETER VERNIERO, ATTORNEY GENERAL for the STATE OF NEW JERSEY and the STATE OF NEW JERSEY,

Defendants-Respondents.

Argued January 22, 1998 -- Decided July 21, 1998

On certification to the Superior Court, Appellate Division, whose opinion is reported at 298 N.J. Super. 230 (1997).

Barry Nelson Covert, a member of the New York bar, argued the cause for appellants (Steven S. Polinsky, attorney; Mr. Polinsky and Paul J. Cambria, Jr., a member of the New York bar, on the briefs).

Larry R. Etzweiler, Senior Deputy Attorney General, argued the cause for respondents (Peter Verniero, Attorney General of New Jersey, attorney; Mary C. Jacobson, Assistant Attorney General, of counsel).

The opinion of the Court was delivered by

COLEMAN, J.

This appeal challenges the constitutionality of N.J.S.A. 2C:34-7c that restricts the size, number, and content of signs that sexually oriented businesses may display. The case calls for the sensitive balancing of the interests of sexually oriented businesses in free speech with the State's interest in minimizing the adverse secondary effects caused by those businesses. The Appellate Division found that the statute does not violate federal or state constitutional guarantees to freedom of speech and that the statute is not void for vagueness. 298 N.J. Super. 230 (1997). We granted certification, 150 N.J. 24 (1997), and now affirm.

I

For some time prior to August 1995, plaintiffs Hamilton Amusement Center, Inc., t/a Video Express, L.O.J., Inc., t/a The Emporium, Pynco Inc., t/a Camelot Book Store, and Crescendo Book, Inc., t/a Carnival Books (collectively referred to as "Hamilton" or "plaintiffs") owned or operated sexually oriented businesses selling a variety of magazines, books and videotapes,

including adult materials. Plaintiffs used large signs to advertise the types of products sold, operating hours, and the locations of entrances. On August 16, 1995, Governor Whitman signed Assembly Bill No. 252 (1994), L. 1995, c. 230, codified at N.J.S.A. 2C:34-6 and N.J.S.A. 2C:34-7 that directly affects those signs. N.J.S.A. 2C:34-6 defines the key words and phrases used in the legislation, and N.J.S.A. 2C:34-7 contains the restrictions on signage and the establishment of perimeter buffer requirements that triggered this litigation.

On September 3, 1995, plaintiffs instituted the present litigation challenging the constitutionality of the signage restrictions in N.J.S.A. 2C:34-7c. Subsection c provides: "No sexually oriented business shall display more than two exterior signs, consisting of one identification sign and one sign giving notice that the premises are off limits to minors. The identification sign shall be no more than 40 square feet in size." N.J.S.A. 2C:34-7c.

Plaintiffs alleged in their complaint that those restrictions violate the First Amendment to the United States Constitution and Article I, Paragraph 6 of the New Jersey Constitution. Plaintiffs also contended that the provision is unconstitutionally vague because it fails to define "identification sign." Finally, they alleged that

N.J.S.A. 2C:34-7c violates their Fourteenth Amendment rights to equal protection because the statute targets only sexually oriented businesses. Plaintiffs sought declaratory and injunctive relief to prevent the State from enforcing N.J.S.A. 2C:34-7c.

The trial court determined that N.J.S.A. 2C:34-7c was a content-based restriction on speech and applied strict scrutiny. The court found the provision unconstitutional under Article I, Paragraph 6 of the New Jersey Constitution because the State failed to articulate a factual basis to establish the legitimacy of its asserted compelling state interests -- traffic safety and the protection of minors. Alternatively, the trial court found that the statute failed to survive the less onerous time, place, and manner analysis because it was not narrowly tailored to protect against the secondary effects of sexually oriented businesses. The trial court entered a permanent injunction on December 19, 1995.

The Appellate Division reversed, concluding that N.J.S.A. 2C:34-7c targets only commercial speech and therefore is not subject to strict scrutiny. Hamilton, supra, 298 N.J. Super. at 238. The Appellate Division reasoned that the protection of minors and the regulation of traffic safety are both substantial governmental interests, id. at

239-40, and that N.J.S.A. 2C:34-7c is not substantially broader than necessary because it allows two signs, does not proscribe other modes of advertisement, does not limit the material that may be displayed within the store, and does not place any significant limitation an what may be advertised on the two signs. Id. at 241.

The Appellate Division construed the sign requirements to permit affixing the street numbers of the property as required by federal postal regulations and to permit the posting of temporary political signs. Id. at 241 n.6. The Appellate Division also interpreted "identification sign" to include: the name of the establishment; its street number; its telephone number; its operating hours; and the general nature of the establishment. Id. at 242.

II

First, we address plaintiffs' contention that N.J.S.A. 2C:34-7c violates state and federal constitutional guarantees of free speech. The First Amendment to the United States Constitution provides that "Congress shall make no law . . . abridging the freedom of speech . . . " U.S. Const. amend. I. The First Amendment restriction on governmental interference with free speech was made

applicable to the states by the Fourteenth Amendment to the United States Constitution. U.S. Const. amend. XIV, §1; 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 516, 116 S. Ct. 1495, 1515, 134 L. Ed. 2d 711, 736 (1996); Cantwell v. Connecticut, 310 U.S. 296, 303, 60 S. Ct. 900, 903, 84 L. Ed. 1213, 1218 (1939).

Article I, Paragraph 6 of the New Jersey Constitution provides: "Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or of the press." N.J. Const. art. I, ¶6. Because we ordinarily interpret our State Constitution's free speech clause to be no more restrictive than the federal free speech clause, Shelton College v. State Bd. of Educ., 48 N.J. 501, 518 (1967), "[w]e rely on federal constitutional principles in interpreting the free speech clause of the New Jersey Constitution." Karins v. City of Atlantic City, 152 N.J. 532, 547 (1998); see Bell v. Township of Stafford, 110 N.J. 384, 393 (1988) (stating that constitutional approach taken by United States Supreme Court when examining commercial speech conforms to our own). Two exceptions to the general rule, which are not involved here, are political expressions at privately-owned-and-operated shopping malls, New Jersey

Coalition v. J.M.B., 138 N.J. 326 (1994), and defamation, Sisler v. Gannett Co., 104 N.J. 256, 271 (1986).

-A-

Our decision whether N.J.S.A. 2C:34-7c regulates only commercial speech will in turn determine the appropriate level of scrutiny to be applied. Plaintiffs argue that both commercial and political speech are impacted by the statute. They contend that even under the Appellate Division's construction of the statute to allow the posting of temporary political signs, they are prohibited from conveying political messages on the identification sign, from posting non-temporary political signs, and from posting signs related to religion or "everyday problems." Plaintiffs also contend that because the statute distinguishes between sexually oriented businesses and other businesses, strict scrutiny is appropriate. We find those arguments to be unpersuasive.

We begin our analysis by defining commercial speech. Commercial speech is "expression related solely to the economic interests of the speaker and its audience." Central Hudson Gas Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 561, 100 S. Ct. 2343, 2349, 65 L. Ed. 2d 341,

348 (1980). It is "'speech proposing a commercial transaction. '" Id. at 562, 100 S. Ct. at 2349, 65 L. Ed. 2d at 348 (quoting Ohralik v. Ohio State Bar Ass'n, 436 U.S. 477, 455-56, 98 S. Ct. 1912, 56 L. Ed. 2d 444 (1978)); see also Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 66-67, 103 S. Ct. 2875, 2880-81, 77 L. Ed. 2d 469, 477-78 (1983) (holding that combination of following characteristics of communication "provides strong support" for conclusion that communication is "properly characterized as commercial speech": advertisement, mention of specific product, and economic motivation).

N.J.S.A. 2C:34-7c restricts, rather than prohibits altogether, the signs that sexually oriented businesses may display. We find nothing to suggest that the statute restricts more than commercial speech, or that the Legislature contemplated that its application would extend beyond the commercial context. Although outdoor signs are often used to convey political, social, and commercial ideas, plaintiffs have made no showing of actual noncommercial use. Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 501, 101 S. Ct. 2882, 2889, 69 L. Ed. 2d 800, 811 (1981). On the contrary, the record reveals the messages conveyed on plaintiffs' signs that predated the litigation are limited to business identification, the types of products sold, business

hours, location of the video rental sections of the businesses, location of entrances, and parking information. Although plaintiffs could conceivably use their signs to convey noncommercial messages, they have not done so. We therefore decline to discuss political speech in a hypothetical case that is not before us. Furthermore, nothing in the legislative history suggests that the Legislature intended that the statute restrict political speech. We hold, therefore, that the statute applies only to commercial speech.

-B-

Our conclusion that N.J.S.A. 2C:34-7c has as its purpose the regulation of commercial speech does not mean that no constitutional protection is afforded to plaintiffs. On the contrary, the First Amendment protects commercial speech when the threshold requirements are met: that the speech is not misleading and relates to lawful activity. Central Hudson, supra, 447 U.S. at 563-64, 100 S. Ct. at 2350, 65 L. Ed. 2d at 349; see Schad v. Borough of Mt. Ephraim, 452 U.S. 61, 65-66, 101 S. Ct. 2176, 2180-81, 68 L. Ed. 2d 671, 678-79 (1981) (recognizing First Amendment protection for sexually explicit speech that is

not "obscene"); In re Anis, 126 N.J. 448, 456 (1992). It is a limited measure of protection, however, because the First Amendment "accords less protection to commercial speech than to other constitutionally-guaranteed expression." Barry v. Arrow Pontiac, Inc., 100 N.J. 57, 72 (1985); Town Tobacconist v. Kimmelman, 94 N.J. 85, 125 (1983). The limited measure of protection afforded commercial speech is "'commensurate with its subordinate position in the scale of First Amendment values.'" Metromedia, supra, 453 U.S. at 506, 101 S. Ct. at 2892, 69 L. Ed. 2d at 814 (quoting Ohralik, supra, 436 U.S. at 456, 98 S. Ct. at 1912, 49 L. Ed. 2d at 444); Central Hudson, supra, 447 U.S. at 562-63, 100 S. Ct. at 2349-50, 65 L. Ed. 2d at 348-49.

Central Hudson articulated a four-part test for determining when regulating commercial speech does not violate the First Amendment:

> [1 I]t at least must concern lawful activity and not be misleading. [2] Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine [3] whether the regulation directly advances the governmental interest asserted, and [4] whether it is no more extensive than is necessary to serve that interest.
>
> [Central Hudson, supra, 447 U.S. at 566, 100 S. Ct. at 2350, 66 L. Ed. 2d at 351.

Subsequently, in 44 Liquormart, the Supreme Court held that Rhode Island's complete ban on liquor price advertising violated the First Amendment. 44 Liquormart, supra, 517 U.S. at 516, 116 S. Ct. at 1515, 134 L. Ed. 2d at 736. Similarly, Central Hudson involved a total ban of forms of commercial advertising found to violate the First Amendment because the government failed to demonstrate that a more limited speech regulation would not have adequately served the governmental interest.

Although the present case does not involve a total ban on commercial expression, the governmental regulation must be examined under both the Central Hudson standard and the time, place, and manner test articulated in Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293, 104 S. Ct. 3065, 3069, 82 L. Ed. 2d 221, 227 (1984). The time, place, and manner restrictions on protected speech are valid provided they "are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information." Ibid. Because the Central Hudson and Clark standards are closely intertwined in this case, we will conduct the two analyses simultaneously. City of Renton v. Playtime Theatres, Inc.,

475 U.S. 41, 46, 54-55, 106 S. Ct. 925, 928, 932, 89 L. Ed. 2d 29, 37, 42 (1986).

In addition to concluding that N.J.S.A. 2C:34-7c targets only commerical speech, we are also persuaded that the statute is content-neutral. A statute or ordinance is considered to be content-neutral when the legislature's predominant concern is with adverse secondary effects, such as those caused by sexually oriented businesses, and not with the content of the speech being restricted. Ward v. Rock Against Racism, 491 U.S. 781, 791, 109 S. Ct. 2746, 2754, 105 L. Ed. 2d 661, 675 (1989). An incidental effect on some speech does not change the content-neutral characterization. Ibid.

Having concluded that N.J.S.A. 2C:34-7c targets only commercial speech and that such speech is provided a limited measure of protection under the First Amendment, we are required to engage in an intermediate scrutiny of the restrictions imposed by N.J.S.A. 2C:34-7c. Florida Bar v. Went For It, Inc., 515 U.S. 618, 623, 115 S. Ct. 2371, 2375-76, 132 L. Ed. 2d 541, 549 (1995). Moreover, courts have generally analyzed statutes and ordinances restricting sexually oriented businesses under an intermediate level of scrutiny because of the unique secondary effects associated with those businesses. Young v. American Mini Theatres,

Inc., 427 U.S. 50, 70, 96 S. Ct. 2440, 2452, 49 L. Ed. 2d 310, 326 (1976) .

The intermediate scrutiny will be conducted pursuant to Central Hudson and Clark. "Unlike rational basis review [applied by the trial court in the present case], the Central Hudson [intermediate] standard does not permit [a court] to supplant the precise interests put forward by the State with other suppositions." Edenfield v. Fane, 507 U.S. 761, 768, 113 S. Ct. 1792, 1798, 123 L. Ed. 2d 543, 553 (1993). In this case, that means that the State cannot substitute another substantial interest for its assertion that N.J.S.A. 2C:34-7c is required to protect minors and to promote traffic safety. It may, however, advance other substantial interests in addition to those two.

-C-

Under a commercial speech analysis, first we must determine whether the speech at issue merits protection by examining whether the speech concerns lawful activity that is not misleading. Central Hudson, supra, 447 U.S. at 566, 100 S. Ct. at 2350, 65 L. Ed. 2d at 351. There has been no suggestion that the commercial advertising challenged here is misleading or involves unlawful activity or obscene

material. Therefore, under the threshold prong of the Central Hudson test the case before us involves protected commercial speech.

Next, we focus on Central Hudson's second prong, namely whether a substantial governmental interest is advanced by regulating the commercial speech involved here. We will combine that discussion with our analysis under the first prong of the time, place, and manner test: whether the regulation is justifiable without reference to content. In the trial court, the State argued that the statute served two substantial state interests: (1) traffic safety; and (2) the welfare of minors. Before the Appellate Division, the State expanded the list of secondary effects it sought to address with N.J.S.A. 2C:34-7c, arguing that sexually oriented businesses, as well as the signs that advertise their existence, generally detract from neighborhood stability and contribute to prostitution, crime, juvenile delinquency, deterioration in property values, and lethargy in neighborhood improvement efforts.

The burden is on the State to establish the existence of the substantial governmental interest it sought to advance through the signage regulation. To assist in meeting this burden, the State relies on an established rule of statutory interpretation:

> Consistent with the judicial predisposition in favor of the validity of legislation, courts will readily impute a proper governmental purpose or interest as the object to be served by the enactment, and, if need be, infer an adequate factual basis to support legislative regulations, even in the absence of particular purposes or specific findings being expressed by the lawmakers.
>
> Nevertheless, if an enactment directly impinges on a constitutionally protected right, the presumption in favor of its validity disappears. Courts are far more demanding of clarity, specificity and restrictiveness with respect to legislative enactments that have a demonstrable impact on fundamental rights.
>
> [Bell, supra, 110 N.J. at 394-95 (citations omitted).]

The government's failure to sufficiently substantiate its alleged substantial interests can be constitutionally fatal to a regulation. See, e.g., id. at 396 (striking down ordinance because of failure to reveal objectives or factual underpinnings); Basiardanes v. City of Galveston, 682 F.2d 1203, 1215-16 (5th Cir. 1982) (finding that city had failed to prove justifiable interest in regulation prohibiting advertising by adult theaters because there was no evidence that city conducted careful study of effects of adult

theaters). The First Amendment, however, does not require a legislative body "to conduct new studies or produce evidence independent of that already generated by other cities" before enacting a regulation affecting sexually oriented businesses, "so long as whatever evidence the [legislative body] relies upon is reasonably believed to be relevant to the problem" addressed. City of Renton, supra, 475 U.S. at 51-52, 106 S. Ct. at 931, 89 L. Ed. 2d at 40. In Renton, the United States Supreme Court found that although the city had not conducted its own hearings on its locational zoning ordinance, it was entitled to rely upon another city's studies that had been placed in the record. Ibid. Unlike the city in Renton, however, when enacting N.J.S.A. 2C:34-7c, the Legislature did not place into the record the studies of this or any other jurisdiction; nor is there evidence that lawmakers relied on such studies. Similarly, the record does not reflect that the Legislature relied on decisional law from this or any other jurisdiction that discusses the detrimental secondary effects of sexually oriented businesses. Nonetheless, we will consider the precedents. Viewed collectively, a national consensus emerges regarding the secondary effects of sexually oriented businesses.

Both the United States Supreme Court and this Court

have held that the government does not have a heavy burden to satisfy the substantial governmental interest prong of the Central Hudson standard. That burden may be satisfied in a variety of different ways. As recently as 1995, the Supreme Court stated that

> we do not read our case law to require that empirical data come to us accompanied by a surfeit of background information. Indeed, in other First Amendment contexts, we have permitted litigants to justify speech restrictions by reference to studies and anecdotes pertaining to different locales altogether, see City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 50-51, 106 S. Ct. 925, 89 L. Ed. 2d 29 (1986); Barnes v. Glen Theatre, Inc., 501 U.S. 560, 584-585, 111 S. Ct. 2456, 115 L. Ed. 2d 504 (1991) (Souter, J., concurring in the judgment), or even, in a case applying strict scrutiny, to justify restrictions based solely on history, consensus, and "simple common sense," Burson v. Freeman, 504 U.S. 191, 211, 112 S. Ct. 1846, 119 L. Ed., 2d 5 (1992). Nothing in Edenfield, supra, a case in which the State offered *no* evidence or anecdotes in support of its restriction, requires more.
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> [Florida Bar, supra, 515 U.S. at 628, 115 S. Ct. at 2378, 132 L. Ed. 2d at 552.]

The Supreme Court has recognized that sexually oriented businesses can cause concrete and non-speculative side

effects that government can target. These effects include promoting juvenile delinquency, contributing to an overall increase in crime, creating an environment that leads to the general deterioration of neighborhoods, and lowering property values. City of Renton, supra, 475 U.S. at 51, 106 S. Ct. at 931, 89 L. Ed. 2d at 40.

Additionally, this Court has held that a zoning ordinance need not articulate its objectives but may be sustained against constitutional challenge on the presentation in court of evidence supporting the governmental interest advanced by the ordinance. Zilinsky v. Zoning Bd. of Adjustment, 105 N.J. 363, 371 (1987). Thus, the substantial governmental interest prong can be satisfied by reference to studies pertaining to other jurisdictions, legislative history, consensus, and even common sense. The State maintains that the legislative history reflecting the State's substantial interest in ameliorating the negative effects of sexually oriented businesses consists of a position report submitted by Concerned Women for America, a floor speech given by the bill's sponsor, Assemblywoman Crecco, and the legislative history of N.J.S.A. 2C:33-12.2.

The Assembly Judiciary, Law and Public Safety Committee considered the Concerned Women report. That

report focuses on the connection between violent, sexually explicit material and violent crime, but does not mention signage. The report does not address traffic safety or harm to minors; nor does it address the additional effects that were presented to the Appellate Division.

Assemblywoman Crecco's speech supports the State's assertion that the Legislature was concerned with the protection of minors and the reduction of traffic hazards. She explained that "[s]ign restrictions would be advantageous because multiple signs distract motorists and cause accidents." Crecco also referred to the welfare of minors twice in her speech. First, she mentioned minors in reference to buffer planting, but not in reference to signage restrictions. Second, she stated that "[w]e need to put the brakes on these sorts of element [sic] in all municipalities . . . . Parents are concerned about their children being exposed to these types of perverted establishments and their sordid activities." Assemblywoman Crecco, however, did not offer evidentiary support for her conclusions.

Further support for the proposition that N.J.S.A. 2C:34-7c was enacted to protect the welfare of minors can be found in the text of the statute itself: N.J.S.A. 2C:34-7c requires a sign indicating that the premises are off-limits to minors. Moreover, because N.J.S.A. 2C:34-7c and

N.J.S.A. 2C:33-12.2[1] were part of the same package, consideration of the legislative history of the latter statute is appropriate. In Chez Sez VIII, Inc. v. Poritz, the Appellate Division held that N.J.S.A. 2C:33-12.2 was constitutional, relying on the pre-enactment evidence regarding private viewing booths. 297 N.J. Super. 331, certif. denied, 149 N.J. 409, and cert. denied, ___ U.S. ___, 118 S. Ct. 337, 139 L. Ed. 2d 262 (1997). The history of N.J.S.A. 2C:33-12.2 was not a part of the record in this case at the trial level, but the State introduced it before the Appellate Division. The State has requested this Court to take judicial notice of that history to establish that the Legislature had a factual basis for enacting N.J.S.A. 2C:34-7c.

The legislative history of N.J.S.A. 2C:33-12.2 indicates that, generally, the State was concerned with the negative effects caused by sexually oriented businesses, particularly businesses that operate private viewing booths. The history demonstrates that the Legislature was specifically informed about those effects when it simultaneously enacted N.J.S.A. 2C:33-12.2 and N.J.S.A. 2C:33-7c.

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1 N.J.S.A. 2C:33-12.2 expanded the criminal offense of maintaining a nuisance to cover sexually oriented businesses in certain circumstances.

Furthermore, in an unpublished opinion, a federal district court upheld the 1995 amendments to N.J.S.A. 2C:34-2 to -7 against First and Fourteenth Amendment challenges. Internationally Hott II v. City of Elizabeth, Civ. No. 96-1447 (D.N.J. Apr. 9, 1997). The District Court found the statutes constitutional and determined that a memorandum submitted to the Senate Judiciary Committee, Deputy Attorney General Etzweiler's testimony before the Assembly Judiciary Committee, and Assemblywoman Crecco's statement "detail[ed] the need for these types of narrowly tailored statutes to combat the secondary effects of sexually oriented businesses." Id. at 13.

We conclude that the pre-enactment evidence that was before the Legislature when it enacted N.J.S.A. 2C:33-12.2 and N.J.S.A. 2C:34-7c, and the legislative history as a whole sufficiently establish that the Legislature was genuinely concerned with mitigating the adverse secondary effects of sexually oriented businesses to improve traffic safety, to limit harm to minors, and to reduce prostitution, crime, juvenile delinquency, deterioration in property values, and lethargy in neighborhood improvement efforts. Whether viewed separately or collectively, they represent substantial governmental interests. See American Mini Theaters, supra, 427 U.S. at 80, 96 S. Ct.

at 2457, 49 L. Ed. 2d at 332 (Powell, J., concurring) (finding interests in zoning adult movie theaters substantial because "[W]ithout stable neighborhoods, both residential and commercial, large sections of a modern city quickly can deteriorate into an urban jungle with tragic consequences to social, environmental, and economic values"); Metromedia, supra, 453 U.S. at 507-08, 101 S. Ct. at 2892, 69 L. Ed. 2d at 815 ("Nor can there be substantial doubt that the twin goals that the ordinance seeks to further -- traffic safety and the appearance of the city -- are substantial government goals."); Borrago v. City of Louisville, 456 F. Supp. 30, 33 (W.D. Ken. 1978) (finding no doubt that regulation of adult entertainment furthers "important and substantial" interests); City of Pasco v. Rhine, 753 P.2d 993, 997 (Wash. Ct. App. 1988) (finding that government had substantial interest in mitigating secondary impacts of adult theater's "location in an area not suitable for such theaters").

-D-

The third prong of the commercial speech inquiry is whether the regulation directly advances the government's asserted interests. Central Hudson, supra, 447 U.S. at 566,

100 S. Ct. at 2350, 65 L. Ed. 2d at 351. This inquiry requires us to determine whether the elimination or reduction of the asserted negative effects of sexually oriented businesses can be achieved by regulating the number of signs, sign content, and sign size.

"[A] governmental body . . . must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." Edenfield, supra, 507 U.S. at 770-71, 113 S. Ct. at 1800, 123 L. Ed. 2d at 555. Therefore, sign regulations are permissible if the government can "show that the particular restrictions on signs in fact relate to the stated goal." State v. Miller, 83 N.J. 402, 415 (1980) .

In American Mini Theaters, supra, the United States Supreme Court found that a municipality's conclusion that the concentration of sexually oriented businesses, unlike other businesses, "causes the area to deteriorate and become a focus of crime" was "a factual basis" for the conclusion that dispersal requirements would "have the desired effect." American Mini Theaters, supra, 427 U.S. at 71 & n.34, 96 S. Ct. at 2452-53 & n.34, 49 L. Ed. 2d at 326 & n.34. Similarly, we hold that the limitation of the signs promulgated in N.J.S.A. 2C:34-7c directly advances the government's interests in limiting negative secondary

effects, such as neighborhood deterioration and concentration of crime. The limitation of signage may reduce the effects generated by the presence of sexually oriented businesses, particularly in conjunction with the other provisions of N.J.S.A. 2C:34-7, dispersal requirements, locational restrictions, and perimeter buffers. N.J.S.A. 2C:34-7a to -7b.

In Metromedia, supra, the Supreme Court found that the goal of increased traffic safety was furthered by the limitation of off-site advertising billboards. 453 U.S. at 508-09, 101 S. Ct. at 2893, 69 L. Ed. 2d at 815-16. The Court explained that "'[b]illboards are intended to, and undoubtedly do, divert a driver's attention from the roadway.'" Ibid. (quoting California Supreme Court decision in same case). The same is true of the on-site advertising signs limited by N.J.S.A. 2C:34-7c. "Unlike oral speech, signs take up space and may obstruct views, distract motorists, displace alternative uses for land, and pose other problems that legitimately call for regulation." City of Ladue v. Gilleo, 512 U.S. 43, 48, 114 S. Ct. 2038, 2041,129 L. Ed. 2d 36, 42-43 (1994) (emphasis added). The Legislature could reasonably conclude that the nature and content of the signs of sexually oriented businesses cause greater distraction to motorists

than other commercial signs. But cf. Rappa v. New Castle County, 18 F.3d 1043, 1082 (3d Cir. 1994) (Garth, J., concurring and dissenting) ("[T]he allowance of some signs, but not others, is evidence that the government's asserted interests in traffic safety and aesthetics are not sufficiently compelling to justify disparate treatment between classes of speech.").

We also conclude that the sign limitations serve the State's interest in protecting the welfare of minors. The Legislature has chosen to criminalize the sale, distribution, rental, or exhibition of obscene material to minors. N.J.S.A. 2C:34-3. The requirement that sexually oriented businesses post signs indicating that the businesses are off-limits to minors helps to ensure that minors will be excluded from the premises. Furthermore, we find that the limitations on the identification sign reduce the ability of sexually oriented businesses to attract minors. Moreover, the other goals that we have determined are advanced by N.J.S.A. 2C:34-7c, such as limiting neighborhood deterioration and crime and promoting traffic safety, undoubtedly contribute to the welfare of minors who live in, or pass through, the vicinity of sexually oriented businesses.

The final prong of the commercial speech test is whether the regulation is no more extensive than necessary to serve the State's asserted interests. Central Hudson, supra, 447 U.S. at 566, 100 S. Ct. at 2350, 65 L. Ed. 2d at 351. That inquiry is similar to that part of the time, place, and manner test requiring the narrow tailoring of the regulation and leaving open ample alternative means of communication. Clark, supra, 468 U.S. at 293, 104 S. Ct. at 3069, 82 L. Ed. 2d at 227. Therefore, we must determine whether N.J.S.A. 2C:34-7c is narrowly tailored to serve the State's asserted interests. We combine the narrow tailoring discussion with our analysis under the final prong of the time, place, and manner test, whether the regulation leaves open ample alternative means of communication. Clark, supra, 468 U.S. at 293, 104 S. Ct. at 3069, 82 L. Ed. 2d at 227.

N.J.S.A. 2C:34-7c is not substantially broader than necessary because it: (1) allows two signs to be posted; (2) does not proscribe other modes of advertisement; (3) does not inhibit the material that may be displayed within the store; and, (4) does not place any significant limitation on what might be advertised on the two signs. The statute does

not ban advertising completely, and sexually oriented businesses have a reasonable opportunity to advertise in the print and electronic media. SDJ, Inc. v. City of Houston, 837 F.2d 1268, 1278 (5th Cir. 1988), cert. denied sub nom M.E.F. Enters., Inc. v. City of Houston, 489 U.S. 1052, 109 S. Ct. 1310, 103 L. Ed. 2d 579 (1989); see also State v. J.&J. Painting, 167 N.J. Super. 384, 386 (App. Div. 1979) (regulation "leaves unaffected all other means [for businesses] to advertise their business services -- newspapers, telephone directories, radio and electronic media[, and word of mouth]"). The State "has gone no further than necessary in seeking to meet its ends. Indeed it has stopped short of fully accomplishing its ends: It has not prohibited all" signs. Metromedia, supra, 453 U.S. at 508, 101 S. Ct. at 2893, 69 L. Ed. 2d at 815.

Furthermore, to satisfy Central Hudson and the narrow tailoring requirement of Clark, the regulation need not be the least restrictive means of serving the State's content-neutral substantial interest. Ward, supra, 491 U.S. at 797, 109 S. Ct. at 2757 105 L. Ed. 2d at 679. "[T]he requirement of narrow tailoring is satisfied 'so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation'" and the means chosen does not "burden

substantially more speech than is necessary to further" the State's content-neutral interest. Id. at 799, 109 S. Ct. at 2758, 105 L. Ed. 2d at 680-81 (quoting United States v. Albertini, 472 U.S. 677, 689, 105 S. Ct. 2897, 86 L. Ed. 2d 536 (1985)).

Several other courts examining the same issue found regulations that are more restrictive than N.J.S.A. 2C:34-7c to be sufficiently tailored. For example, in Excalibur Group, Inc. v. City of Minneapolis, 116 F.3d 1216 (8th Cir. 1997), cert. denied, ___ U.S. ___,118 S. Ct. 855, __ L. Ed. 2d ___ (1998), signs were prohibited in windows, a one-square-foot identification sign was permitted on the entrance door, and another identification sign equal to one-square foot for each foot of lot frontage on the street was allowed. All signs had to be flat, wall signs. That meant that a sexually oriented business with a twenty-five foot frontage could have one five-feet-by-five-feet sign. In the present case, a sign for the same frontage could be eight feet by five feet. The signage regulation was found not to be too restrictive because it limited only the outside of the businesses and the city could reasonably conclude that this limitation was best able to buffer the visual and other impacts of those businesses on the neighborhood. Id. at 1222.

SDJ involved an ordinance requiring sexually oriented business to use "simple signs." SDJ, supra, 837 F.2d at 1278. Although the opinion does not contain a definition of "simple signs," the Fifth Circuit found that the signage requirements did not violate the First Amendment.

Similarly, in Borrago, supra, a district court upheld an ordinance that restricted adult entertainment establishments from having more than one outside sign, not to exceed ten feet in length and three feet in width, and "not to contain any emphasis, either by wording or picture or otherwise, on matters relating to sexual activities." 456 F. Supp. at 31. The court concluded that the restrictions were no greater than essential

> in light of the findings . . . that the showing and advertising of adult entertainment attracts an undesirable quantity and quality of transients, causes an increase in crime, and encourages residents and businesses to move elsewhere. The findings, as to the undesirability of the transients who are attracted to this type of entertainment and as to the resulting increase in crime, justify the City in imposing strict controls over the persons who manage and control these types of businesses and also justify the restrictions on advertising.
>
> [Id. at 33.]

The signage regulation in Borrago limiting a sign to no more than thirty square feet was more restrictive than the forty square feet limitation at issue here.

We conclude that although there is no history to explain why the Legislature selected forty square feet as the size limitation, the choice of sign size falls within the ambit of Renton's legislative discretion. "'It is not [the] function [of the Court] to appraise the wisdom of [the governmental regulation because the government] . . . must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems.'" Renton, supra, 475 U.S. at 52, 106 S. Ct. at 931, 89 L. Ed. 2d at 42 (quoting American Mini Theatres, supra, 427 U.S. at 71, 96 S. Ct. at 2440, 49 L. Ed. 2d at 310) . A sign that contains forty square feet represents a reasoned compromise between serving the State's asserted goals and allowing some advertisement. Forty square feet is an adequate amount of space for a business to announce its presence given the secondary effects of sexually oriented business that are unrelated to the content of the signs.

Furthermore, we conclude that the State has an interest in regulating the signage of sexually oriented businesses rather than leaving that function to municipalities. In addressing the goals of protecting minors and increasing

traffic safety, a decision to regulate at a statewide level is rational because it creates uniformity, rather than relying on the various municipalities to regulate individually in their own ways.

III

Next, we consider plaintiffs' vagueness argument. N.J.S.A. 2C:34-7c permits a sexually oriented business to display an "identification sign" that does not exceed forty square feet in size. The trial court held the sign statute void for vagueness because the word "identification" could mean more than name only. The Appellate Division interpreted the statute to mean that "an identification sign may communicate not only the name of the establishment, but also the street number, telephone number, operating hours and general nature of the establishment in order to identify the business." 298 N.J. Super. at 242. Based on that interpretation, the court found the statute was not vague. Ibid. Plaintiffs contend that the Appellate Division's interpretation of the statute has enhanced its vagueness. We disagree.

A statute may be challenged as being either facially vague or vague "as applied." State v. Maldonado, 137 N.J.

536, 563 (1994); State v. Cameron, 100 N.J. 586, 593 (1985). Plaintiffs maintain that the statute is facially vague. The vagueness doctrine involves procedural due process considerations of fair notice and adequate warning. Karins, supra, 152 N.J. at 544. A law is void if it is so vague that persons "'of common intelligence must necessarily guess at its meaning and differ as to its application.'" Town Tobacconist, supra, 94 N.J. at 118 (quoting Connally v. General Constr. Co., 269 U.S. 385, 391, 46 S. Ct. 126, 127, 70 L. Ed. 322, 328 (1926)).

"When a statute's constitutionality is doubtful, a court has the power to engage in 'judicial surgery,'" construing the statute in a constitutional way. Town Tobacconist, supra, 94 N.J. at 104. When a statute is vague, the court's "'power and obligation to narrow imprecise statutory language . . . to render it constitutional is beyond question.'" State v. Mortimer, 135 N.J. 517, 533, cert. denied, 513 U.S. 970, 115 S. Ct. 440, 130 L. Ed. 2d 351 (1994) (quoting State v. Ramseur, 106 N.J. 123, 200 (1987)). That power and obligation exist because the court "'begins with the assumption that the legislature intended to act in a constitutional manner.'" Id. at 534 (quoting Right to Choose v. Byrne, 91 N.J. 287, 311 (1982)). Therefore, we must construe N.J.S.A. 2C:34-7c in a constitutional

manner if it is reasonably susceptible to such a construction. Ibid. In the past, this Court has engaged in "'judicial surgery' to excise a constitutional defect or engraft a needed meaning." Right to Choose, supra, 91 N.J. at 311; see, Mortimer, supra, 135 N.J. at 534-35 (excising unconstitutionally vague language from statute on bias crimes); Town Tobacconist, supra, 94 N.J. at 104 (excising unconstitutionally vague portion of "drug paraphernalia'' definition in Drug Paraphernalia Act); New Jersey State Chamber of Commerce v. New Jersey Election Law Enforcement Comm'n, 82 N.J. 57, 75-81 (1980) (limiting election financing reporting act to avoid overbreadth); Borough of Collingswood v. Ringgold, 66 N.J. 350, 357 (1975), appeal dismissed, 426 U.S. 901, 96 S. Ct. 2220, 48 L. Ed. 2d 826 (1976) (limiting ordinance requiring prior registration of canvassers and solicitors to door-to-door activity on private property); Camarco v. City of Orange, 61 N.J. 463, 466 (1972) (limiting anti-loitering ordinance to interference with others in public places or threats of immediate breach of peace).

In State v. DeSantis, 65 N.J. 462 (1974), the Court considered the New Jersey criminal laws dealing with obscenity. These laws did not define "obscenity" with the

specificity required by Miller v. California, 413 U.S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973). DeSantis, supra, 65 N.J. at 472. The Court weighed whether it should judicially salvage the statute:

> [I]t is entirely likely that the Legislature will expeditiously deal with the subject in light of all of the opinions in Miller and the related and ensuing cases both federal and state. In the meantime, however, we are confronted with the choice of nullifying L. 1971, c. 449, thereby leaving an interim void . . . or supplying a stopgap constitutional interpretation . . . .[W]e take the latter course which we consider the more consonant with the legislative goals and our precedential judicial expressions.
>
> [Id. at 472-73.]

Accordingly, the Court engrafted the Miller definition of obscenity onto New Jersey's obscenity laws. Id. at 473-74.

Furthermore, the Legislature has explicitly authorized courts to interpret terms contained in the New Jersey Code of Criminal Justice (Code); for example, N.J.S.A. 2C:1-2 provides principles of construction to guide courts in interpreting Code provisions. N. J. S.A. 2C: 1-2 (c) ("The provisions of the Code shall be construed according to the fair import of their terms but when the language is susceptible of differing constructions it shall be interpreted to further the general purposes stated in this section and the

special purposes of the particular provision involved.").

Courts, however, will not unquestioningly construe statutes. In State v. Miller, for example, this Court declined to perform judicial surgery or to adopt a narrow construction of an ordinance prohibiting homeowners from posting signs containing political messages because the ordinance "so directly cuts to the heart of the First Amendment." State v. Miller, 83 N.J. 402, 414 (1980).

The Appellate Division's construction of N.J.S.A. 2C:34-7c was appropriate for several reasons. The Appellate Division complied with its obligation to supply a definition of the type of identification sign that is lawful in order to "restore the statute to health." Town Tobacconist, supra, 94 N.J. at 104. That interpretation was necessary to prevent the statute from being unconstitutionally vague. The term "identification" could mean the establishment's name only, the establishment's name combined with a general description of the nature of its business, or its address, or both. Given that the Legislature enacted N.J.S.A. 2C:34-7c as part of a comprehensive package regulating sexually oriented businesses, it is reasonable to conclude that the Legislature would prefer the court to adopt a "stopgap constitutional interpretation" rather than nullify the statute. Unlike the ordinance at issue in Miller,

supra, N.J.S.A. 2C:34-7c does not "so directly cut [] to the heart of the First Amendment" because N.J.S.A. 2C:34-7c primarily concerns commercial, rather than political, speech. Furthermore, unlike the homeowners in Miller, sexually oriented businesses have multiple commercial means of expression available.

Consistent with N.J.S.A. 2C:1-2(c), which authorizes courts to interpret vague terms in the criminal code, the Appellate Division's construction gives "fair warning of the nature of the conduct proscribed." N.J.S.A. 2C:1-2(a)(4). As a result, sexually oriented businesses will not have to speculate as to what is permitted on their signs.

Additionally, the Appellate Division's construction of "identification" is consistent with several item used to identify businesses: name, location, description of location, description of premises, identity of proprietors and operators, hours of operation, and the type of business performed. The Appellate Division's interpretation allows a sexually oriented business to display the basic elements and function of its commercial identity.

Hamilton argues that the Appellate Division exacerbated the statute's vagueness by failing to define the "general nature of the business," the length of time in posting a political sign that is "temporary," and what constitutes a

political sign. We conclude that N.J.S.A. 2C:34-7c as construed is sufficiently clear and gives adequate notice to sexually oriented businesses to withstand this pre-enforcement challenge. A common sense interpretation of "general nature of the business" allows the establishment to advertise that it in a sexually oriented business and that it sells such products to adults.

We also hold that the term "temporary political sign" is not vague. "Temporary" denotes both physical and temporal impermanence. A person of average intelligence would understand "temporary political signs" to include signs that are not permanently affixed to the establishment's property and that speak to matters relating to the activities of the government, a politician, a political party, or a political issue. For those reasons, the statute is not facially unconstitutional.

IV

Plaintiffs argue that N.J.S.A. 2C:34-7c is impermissibly underinclusive because it exempts all businesses that are not sexually oriented. Therefore, according to plaintiffs, the statute violates their rights to equal protection by discriminating among speakers based

solely upon the content of their speech. We disagree.

The Fourteenth Amendment to the United States Constitution provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. "Of course, the equal protection claim in this case is closely intertwined with First Amendment interests." Police Dep't v. Mosley, 408 U.S. 92, 95, 92 S. Ct. 2286, 2289, 33 L. Ed. 2d 212, 216 (1972). "[T] he notion that a regulation of speech may be impermissibly *under-inclusive* is firmly grounded in First Amendment principles." City of Ladue, supra, 512 U.S. at 51, 114 S. Ct. at 2043, 129 L. Ed. 2d at 45 (emphasis in original).

The Legislature may legitimately distinguish between the speech of sexually oriented businesses and non-sexually oriented businesses because "society's interest in [the former] type of expression is of a wholly different, and lesser magnitude than the interest of untrammeled political debate." American Mini Theaters, supra, 427 U.S. at 70, 96 S. Ct. at 2456, 49 L. Ed. 2d at 326. Thus, a state "may legitimately use the content of [sexually oriented] materials as the basis for placing them in a different classification from other motion pictures." Id. at 70-71, 96 S. Ct. at 2456, 49 L. Ed. 2d at 326. This reasoning applies equally

to the signs of sexually oriented businesses as to adult films. We conclude, therefore, that N.J.S.A. 2C:34-7c is not constitutionally infirm based on either equal protection or underinclusiveness concerns.

V

Finally, plaintiffs contend that N.J.S.A. 2C:34-7c acts as a prior restraint. In general, "[t]he term prior restraint is used 'to describe administrative and judicial orders *forbidding* certain communications when issued in advance of the time that such communications are to occur.'" Alexander v. United States, 509 U.S. 544, 550, 113 S. Ct. 2766, 2771, 125 L. Ed. 2d 441, 450 (1993) (quoting M. Nambour, Nambour on Freedom of Speech § 4.03 at 4-14 (1984)); Murray v. Lawson, 138 N.J. 206, 221-22 (1994), cert. denied, 515 U.S. 1110, 115 S. Ct. 2264, 132 L. Ed. 2d 269 (1995). "The Supreme Court and lower federal courts have frequently noted that traditional concerns about prior restraint raised by forms of prepublication review such as the review procedure we permit today do not apply with the same force in the commercial speech context." IMO Petition of Felmeister & Isaacs, 104 N.J. 515, 550 n.20 (1986).

One of the factors considered in determining if a restriction is a prior restraint is whether it "prevents the expression of a message. Thus, the Supreme Court has consistently found (often without discussion) that injunctions are prior restraints if they forbid entirely the publication of a message." Murray, supra, 138 N.J. at 222. N.J.S.A. 2C:34-7c does not act as a prior restraint, however, because it does not prohibit plaintiffs from expressing their message entirely. Rather, they are simply prohibited from expressing it on signs larger than those permitted by the statute. See id. at 223 (finding that injunction did not act as prior restraint because it only "prohibited [defendants] from expressing [message] by picketing within the 300-foot zone that the injunction establishes"). More importantly, there is no prior restraint here because plaintiff has sought to restrain enforcement of the statute while the government has taken no specific act to restrain plaintiffs' expressions.

VI

The power of this Court to declare a statute unconstitutional must be delicately exercised. Harvey v. Board of Chosen Freeholders, 30 N.J. 381, 388 (1959).

The strong presumption of constitutionality that attaches to a statute can be rebutted only upon a showing that the statute's "repugnancy to the Constitution is clear beyond a reasonable doubt." Ibid.; Franklin v. New Jersey Dept. of Human Servs., 111 N.J. 1, 17 (1988); New Jersey Sports & Exposition Auth. v. McCrane, 61 N.J. 1, 8-9 (1972). An observation made by Justice Holmes nearly a century ago is applicable to the present case. "Great constitutional provisions must be administered with caution. Some play must be allowed for the joints of the machine, and it must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts." Missouri, Kansas, & Texas Ry. Co. v. May, 194 U.S. 267, 270, 24 S. Ct. 638, 639, 48 L. Ed. 971, 973 (1904).

We conclude that the strong presumption of the validity of N.J.S.A. 2C:34-7c has not been rebutted. We hold that the statute is constitutional. The judgment of the Appellate Division is therefore affirmed.

CHIEF JUSTICE PORITZ and JUSTICES HANDLER, POLLOCK, O'HERN, and GARIBALDI join in JUSTICE COLEMAN's opinion. JUSTICE STEIN has filed a separate opinion concurring in part and dissenting in part.

SUPREME COURT OF NEW JERSEY
A-64 September Term 1997

HAMILTON AMUSEMENT CENTER, t/a
VIDEO EXPRESS, L.O.J., INC., t/a
THE EXPORIUM, PYNCO, INC., t/a
CAMELOT BOOK STORE and
CRESCENDO BOOKS, INC., t/a
CARNIVAL BOOKS,

Plaintiffs-Appellants,

v.

PETER VERNIERO, ATTORNEY GENERAL for the STATE OF NEW JERSEY and the STATE OF NEW JERSEY,

Defendants-Respondents.

STEIN, J., concurring in part and dissenting in part.

The Court sustains, against a First Amendment challenge, the constitutionality of a statute that limits sexually oriented businesses throughout the State to two exterior signs, one giving notice that the promises are off limits to minors, and the other -- an identification sign -- restricted in size to forty square feet. The State contends that the statute is sustainable because its purpose is content -neutral. That is, the statute does not seek to regulate the constitutionally protected speech engaged in by sexually

oriented businesses, but rather seeks to regulate the secondary effects of those businesses. The secondary effects that the State claims to be fostered by the sign regulation are traffic safety and the welfare of minors.

I do not necessarily disagree with the court's conclusion that the challenged statute regulates only commercial speech and that its constitutionality should be determined on the basis of an intermediate standard of scrutiny. Ante at ____ (slip op. at 6-12). Nor do I disagree with the Court's determination that "[t]he burden in on the State to establish the existence of the substantial governmental interest it sought to advance through the signage regulation." Ante at ____ (slip op. at 13).

I part company with the Court when it elects to wink at the complete lack of legislative findings supporting the alleged governmental interest and sustains the statute without imposing on the State the burden of proving to the trial court that the alleged governmental interests are not pretextual. If those interests are pretextual, the Court would agree that the statute cannot be sustained. But the record evidence that the Court credits as supporting the alleged governmental interests is embarrassingly weak, and the State inexplicably did not supplement that evidence in the proceeding before the trial court. The Court ought not so

readily compromise its responsibility to the interests protected by the First Amendment.

I

The Court appropriately relies on Central Hudson Gas & Electric Corp. v. Public Service Commission of New York, 447 U.S. 557, 566, 100 S. Ct. 2343, 2346-47, 65 L. Ed. 2d 341, 351 (1980), as a source of the standards for testing the validity of restrictions an commercial speech against First Amendment protections:

> In commercial speech cases, then, a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

The United States Supreme Court continues to insist on adherence to the Central Hudson standard in assessing the

constitutionality of commercial speech regulations. In Edenfleld v. Fans, 507 U.S. 761, 113 S. Ct. 1792, 123 L. Ed. 2d 543 (1993), the Court invalidated under the First and Fourteenth Amendments Florida's ban on personal solicitation of prospective clients by certified public accountants. The Court observed:

> It is well established that "[tlhe party seeking to uphold a restriction on commercial speech carries the burden of justifying it." Bolger v. Youngs Drug Products Corp., 463 U.S. 60, 71 n.20, 103 S. Ct. 2875, 2883 n.20, 77 L. Ed. 2d 469, 480 n.20 (1983). This burden in not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree. Without this requirement, a State could with ease restrict commercial speech in the service of other objectives that could not themselves justify a burden on commercial expression.
>
> . . . . .
>
> "Broad prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." NAACP v. Button, 371 U.S. 415, 438, 83 S. Ct. 328, 340, 9 L. Ed. 2d 405, 421 (1963) (citations omitted). Even under the First Amendment's somewhat more forgiving

> standards for restrictions on commercial speech, a State may not curb protected expression without advancing a substantial governmental interest. Here, the ends sought by the State are not advanced by the speech restriction, and legitimate commercial speech is suppressed. For this reason, the Board's rule infringes upon Fane's right to speak, as guaranteed by the Constitution.
>
> [Id. at 770-71, 777, 113 S. Ct. at 1800, 1803-04, 123 L. Ed. Ed. 2d at 555, 559 (citations omitted).]

The Court relies heavily on City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 106 S. Ct. 925, 89 L. Ed. 2d 29 (1986), which upheld the constitutionality of a city zoning ordinance that prohibited adult motion picture theatres from locating within 1,000 feet of any residential zone, single or multiple-family dwelling, church, park or school. The Court in Renton adhered to the Central Hudson mandate that the proponents of a legislative enactment regulating commercial speech must demonstrate that the regulation "is designed to serve a substantial government interest . . . . " Id. at 50, 106 S. Ct. at 930, 89 L. Ed. 2d at 39. However, the Court rejected the Court of Appeals's holding that the ordinance was conclusory and speculative because the City had not conducted its own studies that reflected the need for the restriction. Id. at 50, 106 S. Ct. at 930, 89 L. Ed. 2d at 39-40. The Court observed that the

record reflected the City Council's reliance on studies produced by the City of Seattle focusing on the secondary effects of adult movie theaters, and also its reliance on the opinion of the Supreme Court of Washington in upholding the Seattle ordinance. Id., at 51-52, 106 S. Ct. at 931, 89 L. Ed. 2d at 40. The Court concluded:

> We hold that Renton was entitled to rely on the experiences of Seattle and other cities, and in particular on the "detailed findings" summarized in the Washington Supreme Court's Northend Cinema opinion, in enacting its adult theater zoning ordinance. The First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon in reasonably believed to be relevant to the problem that the city addresses. That was the came here.
>
> [Ibid.]

This Court acknowledges that

> Unlike the city in Renton, however, when enacting N.J.S.A. 2C:34-7c, the Legislature did not place into the record the studies of this or any other jurisdiction; nor in there evidence that lawmakers relied an such studies. Similarly, the record does not reflect that the Legislature relied on decisional law from this or any other jurisdiction that discusses the detrimental

> secondary effects of sexually oriented businesses.
>
> [Ante at ____ (slip op. at 15.]

Despite the obvious omission in the legislative record, the Court strains to find some semblance of documentation in the legislative record that identifies the governmental interests at stake and demonstrates that the sign restrictions significantly advance those interests.

Before examining the bits and pieces of the legislative record the Court relies on to sustain this statute, the Third Circuit Court of Appeals's recent analysis of the governmental burden in sustaining commercial speech restrictions is highly pertinent and provides a frame of reference for evaluating the soundness of the Court's analysis. In Phillips v. Borough of Keyport, 107 F. 3d 164 (1997), the Third Circuit reversed as premature a District Court judgment sustaining the constitutionality of a local ordinance restricting adult entertainment uses to industrial districts and prohibiting them within 300 feet of residential zones, schools, churches, public playgrounds, swimming pools, parks and libraries, id. at 170-71, remanding the matter to the District Court for an evidentiary hearing in which the Borough would be required to identify the secondary governmental interests that justify the ordinance

and to prove that the ordinance is reasonably tailored to promote those interests. Id. at 173. The Court of Appeals rejected the plaintiffs' contention that the ordinance could not be sustained because the Borough did not have before it at the time of adoption evidence that would sustain the constitutionality of the ordinance. The Court stated:

> There in a significant difference between the requirement that there be a factual basis for a legislative judgment presented in court when that judgment is challenged and a requirement that such a factual basis have been submitted to the legislative body prior to the enactment of the legislative measure. We have always required the former; we have never required the latter. Whatever level of scrutiny we have applied in a given case, we have always found it acceptable for individual legislators to base their judgments on their own study of the subject matter of the legislation, their communications with constituents, and their own life experience and common sense so long as they come forward with the required showing in the courtroom once a challenge in raised. In reliance on this approach, most municipal and county councils throughout the land and some state legislatures do not hold hearings and compile legislative records before acting on proposed legislative measures. We perceive no justification in policy or doctrine for abandoning our traditional approach. Moreover, we believe that insistence on the creation of a legislative record is an unwarranted intrusion into the internal affairs of the legislative branch of governments.

> If a legislative body can produce in court whatever justification is required of it under the applicable constitutional doctrine, we perceive little to be gained by incurring the expense, effort, and delay involved in requiring it to reenact the legislative measure after parading its evidence through its legislative chamber. A record like that presented to the town council in Renton, can be easily and quickly assembled, and a requirement that this be done is unlikely to deter any municipal body bent on regulating or curbing speech. While we agree with appellants that the creation of a legislative record can have probative value on what the lawmakers had in mind when they acted, we do not understand why its absence should be controlling when the court is otherwise satisfied that the legislative measure has a content-neutral target.
>
> [Id. at 178.]

Judge Rosenn dissented from that aspect of the Court's opinion, expressing the view that under Renton consideration of pre-enactment evidence is a prerequisite to the constitutionality of a legislative restriction on commercial speech:

> We are thus bound by both Supreme Court precedent and the precedent of our own circuit to require at least some evidence at the time of adoption before we sustain a restrictive ordinance of the type

currently before us. The majority is of the view that the legislative body need have no factual basis before it at the time of the enactment of the ordinance, and that such a requirement is only necessary when the legislative judgment is challenged in court. If we look to cases decided in our sister circuits, we also see that no other circuit in this country has espoused the extreme, and I believe incorrect, position taken by the majority. Cases similar to the one at bar have been decided in the First, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, and Eleventh Circuits. Every one of these circuits has interpreted Renton to require pre-enactment evidence, and every one of these circuits has insisted upon such evidence before affirming the constitutionality of a restrictive zoning ordinance.

. . . . .

At this juncture, the effects of adult entertainment establishments are so open and notorious that requiring legislative bodies to consult studies or other evidence confirming their deleterious impact may seem unnecessarily burdensome--just another hoop to jump through in the process of lawmaking. However, this requirement is not without purpose. It limits the risk that legislatures will impose restrictions on speech activities on the basis of supposed secondary effects that on closer scrutiny lack any evidentiary support, and it lends support to the representation that the content-neutral interest articulated by the lawmaking body was not merely pretextual and illicitly designed to suppress speech expression, even that constitutionally protected. I am as sympathetic as the majority to Keyport's well-intentioned purpose of preserving its community life, but the First Amendment cases show that it is "in those instances where protected speech grates most unpleasantly against the sensibilities that judicial vigilance must be at its height." Young v.

American Mini Theatres, 427 U.S. 50, 87, 96 S. Ct. 2440, 2460, 49 L. Ed. 2d 310, 336 (1976) (Stewart, J., dissenting). Because the Borough of Keyport had no evidence of deleterious secondary effects before it when it enacted its restrictive zoning ordinance, our jurisprudence requires that we strike down the ordinance as unconstitutional.

[Id. at 189-90 (citations and footnotes omitted).]

II

The Court cites three sources in its analysis of whether the State has substantiated the governmental interests it seeks to advance through the signage regulation contained in N.J.S.A. 2C:34-7(c). The Court first acknowledges that one of those sources, the position statement by the Concerned Women for America that was considered by the Assembly Judiciary Law and Public Safety Committee, does not address signage, traffic safety, or harm to minors. Its focus is solely on "the connection between violent, sexually explicit material and violent crime . . . " Ante at __ (slip op. at 17).

The Court's opinion breaks new constitutional ground, however, when it purports to rely on the floor speech delivered by the bill's sponsor, Assemblywoman Crecco, as constituting legislative history that establishes the existence

of governmental interests sought to be advanced by the signage regulation. The full text of that speech follows:

> Thank you, Mr. Speaker. I rise today to urge you to vote for the Assembly Committee Substitute to A-252/842 and to offer floor amendments.
>
> The amendments would make this committee substitute consistent with Senate Bill 342, sponsored by Senator Gormley.
>
> This legislation regulates the operations of sexually oriented businesses, such as "juice bars." These establishments would not be allowed to operate within 1,000 feet of any school, playground, park or place or worship, or within 1,000 feet of any residential area.
>
> This bill does not affect the right of municipalities to adopt zoning ordinances establishing so called "combat" zones for the clustering of sexually oriented businesses.
>
> Additionally, the bill mandates the external appearance of sexually oriented businesses be surrounded by 50-foot wide perimeter buffers made up of plantings, and limits the number and size of signs.
>
> This 50 foot distance restriction would help to preserve neighborhoods and to prevent urban blight.
>
> The buffer plantings would help to establish a distance between businesses and minors who may be

in the area. These would also eliminate embarrassment by citizens who might be walking by.

Sign restrictions would be advantageous because multiple signs distract motorists and cause accidents.

This bill also addresses the use of prohibited enclosures or private booths for the purpose of viewing pornographic motion pictures, and other photographic representations which depict or describe sexual activity. This prohibition would help to prevent sexually transmitted diseases.

Violators would be guilty of a crime of the fourth degree, which is punishable by a term of imprisonment of up to 18 months or a fine of up to $7,500 or both.

We need to put the brakes on these sorts of element [sic] in all municipalities in the State of New Jersey. Parents are concerned about their children being exposed to these types of perverted establishments and their sordid activities.

Owners of these businesses need to know that they will not be able to break the law and get away with it.

I ask for your favorable consideration of this bill and the amendments. Thank you.

[Floor Speech in Favor of Assembly Bill 252 (Dec. 15, 1994) (statement of Marion Crecco, Assemblywoman).]

The obvious irrelevance of Assemblywoman Crecco's speech to the issue before us is simply incontrovertible, except to the extent that it demonstrates the Court's willingness to cite to the flimsiest shred of legislative history to sustain this statute. Only two sentences in the speech relate at all to the secondary effects advanced by the State: traffic safety and concern for minors.

> Sign restrictions would be advantageous because multiple signs distract motorists and cause accidents.
>
> We need to put the brakes on these sorts of element [sic] in all municipalities in the State of New Jersey. Parents are concerned about their children being exposed to these types of perverted establishments and their sordid activities.

Obviously, neither statement has any evidentiary support. Although the letter statement mentions children, its reference to "perverted establishments and their sordid activities" more persuasively suggests that the statute is designed to regulate the content of speech rather than to control secondary effects. In any event, the Court's reliance on the speech for any purpose ignores the Supreme Court's admonition in Renton: "What motivates one legislator to make a speech about a statute is not necessarily

what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork." Renton, supra, 475 U.S. at 48, 106 S. Ct. at 929, 89 L. Ed. 2d at 38 (quoting United States v. O'Brien, 391 U.S. 367, 384, 88 S. Ct., 1673, 1683, 20 L. Ed. 2d 672, 684 (1968)).

Finally, the Court relies on the legislative history of N.J.S.A. 2C:33-12.2, a statute that the Legislature considered during approximately the same time frame in which it enacted N.J.S.A. 2C:34-7(c). That statute makes it unlawful for the operator of a sexually-oriented business to offer for public use booths, screens, enclosures or other devices that facilitate sexual activity by patrons.

The Court acknowledges that the legislative history of N.J.S.A. 2C:33-12.2 was not part of the trial record in this proceeding, but was included in the State's Appellate Division appendix. Ante at ___ (slip op. at 18). The Court further acknowledges that the legislative history of N.J.S.A. 2C:33-12.2 demonstrates the Legislature's concern with the secondary effects of sexually oriented businesses that provide private viewing booths for their patrons. Ante at __ (slip op. at 18-19). What the Court fails to acknowledge in that the legislative history of N.J.S.A. 2C:32-12.2 proffered by the State can be scoured from beginning to end without discovering any evidence

whatsoever that even remotely suggests that N.J.S.A. 2C:34-7(c) advances the governmental interest in promoting traffic safety or in protecting minors. The Court's reliance on that legislative history is diversionary and unjustified.

III

The hard fact is that this record not only contains insufficient evidence to sustain this statute -- it contains no evidence at all. The State could not help but be aware of the deficiencies in the record. Inexplicably, the State failed to avail itself of the opportunity to introduce supplemental supporting evidence before the trial court of the secondary governmental interests served by the statute and of how the statute advances those interests. That the State could have produced evidence sufficient to sustain the statute I have little doubt. I have no doubt, however, that for the Court to comb this record in a vain attempt to find evidence that the State simply has failed to produce is both unseemly and inappropriate. In short, that is not our job.

In sustaining this statute we ignore not only federal precedents but our own as well. In Zilinsky v. Zoning Board of Adjustment of Verona, 105 N.J. 363, 371 (1987), we acknowledged that when a fundamental right is

infringed by ordinance a municipality has the burden of articulating the governmental objectives underlying the ordinance either in the legislative process or by offering testimony at a court hearing. In Bell v. Township of Stafford, 110 N.J. 384 (1988), we invalidated a municipal ordinance that prohibited billboards throughout the municipality precisely because the Township failed to demonstrate the governmental interests advanced by the ordinance. We observed:

> In applying the test for determining the constitutional validity of an enactment that restricts or impinges on freedom of speech and expression, we are mindful that ordinarily legislative enactments are presumed to be valid and the burden to prove invalidity is a heavy one . . .
>
> Nevertheless, if an enactment directly impinges on a constitutionally protected right, the presumption in favor of its validity disappears. Courts are far more demanding of clarity, specificity and restrictiveness with respect to legislative enactments that have a demonstrable impact on fundamental rights. . .
>
> The ordinance fails to reveal either its particular governmental objectives or its factual underpinnings. As the Appellate Division noted, the record is almost completely devoid of any evidence concerning what interests of Stafford are served by the ordinance and the extent to which the

> ordinance has advanced those interests. Because the exercise of first amendment rights and freedom of speech are at stake, the municipality cannot seek refuge in a presumption of validity. It clearly had the burden to present and confirm those compelling legitimate governmental interests and a reasonable factual basis for its regulatory scheme in order to validate its legislative action. Its failure to do so is fatal.
>
> [Id. at 394-96 (citations omitted).]

In State v. Miller, 83 N.J. 402 (1980), we invalidated a municipal ordinance that severely restricted the content of signs in residential areas and limited the size of such signs to not more than six square feet. We noted that "[t]o withstand the strict constitutional scrutiny required here, the restriction on signs must be tied to a compelling municipal interest . . . ." Id. at 414. We also observed that "[l]imitations on the size of a sign may be imposed if the allowable square footage is not determined in an arbitrary manner. . . . Inadequate sign dimensions may strongly impair the free flow of protected speech." Id. at 416.

No evidence in this record suggests any rational basis for the forty-foot limitation on the size of signs permitted for sexually oriented businesses. That a rational basis for that limitation could have been advanced is beside the point. The legislative record on that issue is non-existent,

and for all this Court knows the size limitation was plucked out of thin air.

These are not idealistic or academic concerns. The Fifth Circuit Court of Appeals explained the interests at stake in SDJ. Inc. v. City of Houston, 837 F.2d 1268, 1274 (1988):

> It is true that the effect on speech here is said to be incidental to a regulation aimed at the secondary effects of a business whose activities are within the legitimate scope of the state's police power. Yet, unlike our review under a standard of rationality, we will not hypothesize such an objective or accept a naked assertion. Rather, we intrude into the regulatory decision process to the extent that we insist upon objective evidence of purpose -- a study or findings. Insisting upon findings reduces the risk that a purported effort to regulate effect is a mask for regulation of content. That is, evidence of legitimate purpose is supported by proof that secondary effects actually exist and are the result of the business subject to the regulation. . . . Our task in setting the level of review is to strike for that point of equilibrium that vindicates first amendment values at the least cost to a state's decisional arrangements.

III

I would remand this matter to the Law Division and require the State to prove its case. The record before the Court cannot possibly sustain the constitutionality of the statute under review. For the Court to strain to uphold this statute on the record presented disserves the fundamental and enduring interests protected by the First Amendment.

SUPREME COURT OF NEW JERSEY

NO. A-64 SEPTEMBER TERM 1997

ON APPEAL FROM _____

ON CERTIFICATION TO Appellate Division, Superior Court

HAMILTON AMUSEMENT CENTER, etc., et al.,

Plaintiffs-Appellants,

v.

PETER VERNIERO, et al.,

Defendants-Respondents.

DECIDED July 21, 1998

Chief Justice Portiz PRESIDING

OPINION BY Justice Coleman

CONCURRING/DISSENTING OPINION BY Justice Stein

DISSENTING OPINION BY _____

CHECKLIST	AFFIRM	CONCUR IN PART DISSENT IN PART
CHIEF JUSTICE PORTIZ	X	
JUSTICE HANDLER	X	
JUSTICE POLLOCK	X	
JUSTICE O'HERN	X	
JUSTICE GARIBALDI	X	
JUSTICE STEIN		X
JUSTICE COLEMAN	X	
TOTALS	6	1

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF
NEW JERSEY
APPELLATE DIVISION
A-3176-95T3

HAMILTON AMUSEMENT CENTER, INC.,
t/a VIDEO EXPRESS, L.O.J., INC.,
t/a THE EMPORIUM, PYNCO, INC.,
t/a CAMELOT BOOK STORE, and
CRESCENDO BOOK, INC., t/a
CARNIVAL BOOKS,

Plaintiffs-Respondents,

v.

DEBORAH PORITZ, Attorney General for the
STATE OF NEW JERSEY, and the
STATE OF NEW JERSEY,

Defendants-Appellants.

Approved
for
Publication
Feb 28
1997
Appellate
Divison

Filing Date
Appellate Division
Feb 28 1997
s/R. Emille Cox
clerk

Argued: January 6, 1997 - Decided: Feb 28 1997

Before Judges Petrella, Landau and Kimmelman.

On appeal from Superior Court of New Jersey, Law Division, Mercer County.

Larry R. Etzweiler, Senior Deputy Attorney General, argued the cause for appellants (Peter Verniero, Attorney General, attorney; Mary C. Jacobson, Assistant Attorney General, of counsel; Mr. Etzweiler, on the brief).

Paul J. Cambria, Jr. , of the New York Bar, argued the cause for respondents (Steven S. Polinsky, of the New Jersey Bar, attorney and on the brief; Mr. Cambria, Jr., Cherie L. Peterson, and Barry Nelson Covert, of the New York Bar, also on the brief).

The opinion of the court was delivered by

PETRELLA, P.J.A.D.

This is an appeal by the State of New Jersey from an order permanently enjoining enforcement of N.J.S.A. 2C:34-7(c) as an unconstitutional content-based restriction on free speech or alternatively as void for vagueness.

Hamilton Amusement Center, Inc., t/a Video Express, L.O.J., Inc., t/a The Emporium, Pynco, Inc., t/a Camelot Book Store, and Crescendo Book, Inc., t/a Carnival Books (collectively referred to as plaintiffs) own or operate sexually oriented businesses that use signs which exceed the

statute's restrictions on size, number and content.[1] Plaintiffs sought a declaratory judgment declaring N.J.S.A. 2C:34-7(c) unconstitutional under the First Amendment to the United States Constitution and Article I paragraph 6 of the New Jersey Constitution, and seeking temporary injunctive relief from enforcement of the statute.

The Law Division Judge found in plaintiffs' favor, holding that N.J.S.A. 2C:34-7 (c) was a content-based restriction on speech and presumptively unconstitutional under strict scrutiny. He concluded that the Legislature did not have a compelling interest to warrant the restriction on speech. Alternatively, the judge concluded that the statute would also fail under the less onerous content neutral test of time, place and manner because it was not narrowly tailored. An order was entered making the preliminary injunction final. We conclude that the statute involves commercial speech which does not trigger the strict scrutiny

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[1] Apparently, plaintiffs' signs advertise the type of products sold, operating hours and location of entrances.

standard.[2] The statute passes constitutional muster, and hence we reverse.

I

N.J.S.A. 2C:34-7 was enacted by L. 1995, c. 230, effective September 15, 1995. The sign provisions of the statute are just one subdivision of buffering and site provisions contained in a comprehensive legislative package aimed at sexually oriented businesses. The statute provides:

> Sexually oriented businesses; restrictions on location and display of signs; perimeter buffer requirements
>
> a. Except as provided in a municipal zoning ordinance adopted pursuant to N.J.S. 2C:34-2, no person shall operate a sexually oriented business within 1,000 feet of any existing sexually oriented business, or any church, synagogue, temple or other place of public worship, or any elementary or secondary school or any school bus stop, or any municipal or county

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[2] As this statute applies only to commercial speech, it need only be given an intermediate level of scrutiny. Florida Bar v. Went for it, Inc., ____ U.S. _____, 115 S.Ct. 2371, 2375-2376, 132 L. Ed. 2d 541, 549 (1995); Association of Nat. Advertisers, Inc. v. Lungren, 44 F. 3d 726, 731 (9th Cir. 1994), cert. denied, _____ U.S. _____, 116 S. Ct. 62, 133 L. Ed. 2d 25 (1995).

playground or place of public resort and recreation, or within 1,000 feet of any area zoned for residential use. This subsection shall not apply to a sexually oriented business already lawfully operating on the effective date of this act where another sexually oriented business, an elementary or secondary school or school bus stop, or any municipal or county playground or place of public resort and recreation is subsequently established within 1,000 feet, or a residential district or residential lot is subsequently established within 1,000 feet.

b. Every sexually oriented business shall be surrounded by a perimeter buffer of at least 50 feet in width with plantings, fence, or other physical divider along the outside of the perimeter sufficient to impede the view of the interior of the premises in which the business is located. The municipality may, by ordinance, require the perimeter buffer to meet additional requirements or standards. This subjection shall not apply to a sexually oriented business already lawfully operating on the effective date of this act.

c. No sexually oriented business shall display more than two exterior signs, consisting of one identification sign and one sign giving notice that the premises are off limits to minors. The identification sign shall be no more than 40 square feet in size.

d. A person who violates this section is guilty of a crime of the fourth decree. [N.J.S.A. 2C:34-7(c),(d)].

The sponsors' statement to Assembly Bill No. 252 (A-252) indicates that one purpose of the sign restrictions is to further the government's interest in reducing motor vehicle accidents by eliminating distractions caused by numerous signs. Facially, the statute also reflects a concern for the welfare of minors. This concern is also clear from the legislative history accompanying the package of bills[3] enacted to regulate sexually oriented businesses, and the specific reference in N.J.S.A. 2C:34-7(c) requiring one sign to indicate that the establishment is "off limits to minors." Both aims are appropriate under the State's police power and general welfare responsibilities.

Our inquiry is limited when reviewing legislative motive. See Michael M. v. Sonoma County Superior Court, 450 U.S. 464, 469-470, 101 S. Ct. 1200, 1204-1205, 67 L. Ed. 2d 437, 443 (1981); Palmer v. Thompson, 403 U.S. 217, 224, 91 S. Ct. 1940, 1944, 29 L. Ed. 2d 438, 444 (1971); Two Guys from Harrison, Inc. v. Furman, 32 N.J. 199, 226 (1960); Board of Rec. Commissioners Rutherford v. Rutherford, 166 N.J. Super. 476, 482-483 (App. Div. 1979); N.J. Turnpike Auth. v.

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[3] Assembly Bills Nos. 252, 842 and Senate Bill No. 342.

Sisselman, 106 N.J. Super. 358, 367 (App. Div.), certif. denied, 54 N.J. 565 (1969); City of Las Vegas v. Foley, 747 F.2d 1294, 1297 (9th Cir. 1984). On review, the question is whether the Legislature has the power to act and whether it exercised that mower for a permitted purpose under the Constitution of this State and the United States.

A-252 and Senate Bill No. 342 (N.J.S.A. 2C:33-12.2)[4] were enacted as part of a legislative package addressing different aspects of sexually oriented businesses.

While non-obscene sexual expression receives some protection under the First Amendment, see, TK's Video, Inc. v. Denton County, Tex., 24 F.3d 705, 707 (5th Cir. 1994); Mitchell v. Comm'n on Adult Entertainment Est., 10 F. 3d 123, 130 (3rd Cir. 1993); see e.g., Barnes v. Glen Theatre, Inc., 501 U.S. 560, 111 S. Ct. 2456, 115 L. Ed. 2d 504 (1991) (live nude dancing in adult book store and nightclub); Schad v. Borough of Mt. Ephraim, 452 U.S. 61, 101 S. Ct. 2176, 68 L. Ed. 2d 671 (1981) (live nude dancer in book store); Erznozik v. City of Jacksonville, 422 U.S. 205, 95 S. Ct. 2268, 45 L. Ed. 2d

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[4] N.J.S.A. 2C:33-12.2 was the subject of a separate appeal decided under docket number A-1729-95, captioned Chez Sez VIII v. State, and reported at ____ N.J. Super. _____ App. Div. 1997).

125 (1975) (motion pictures portraying nudity), the Supreme Court permits the targeting of sexually oriented businesses for regulation because of the unique problems they present to the community. Young v. American Mini Theatres, 427 U.S. 50, 70-71, 96 S. Ct. 2440, 2452-2433, 49 L. Ed. 2d 310, 326 (1976); SDJ, Inc. v. City of Houston, 837 F.2d 1268, 1273 (5th Cir. 1988); Mr. B's Bar and Lounge v. City of Louisville, 630 S.W. 2d 564, 567 (Ky. App. 1982).

N.J.S.A. 2C:34-7(c) to an extent impacts speech. See Baldwin v. Redwood, 540 F.2d 1360, 1366 (9th Cir. 1976), cert. denied, sub nom. Leipzig v. Baldwin, 431 U.S. 913, 97 S. Ct., 2173, 53 L. Ed. 2d 223 (1977) ("Communication by signs and posters is virtually pure speech"). Subsection (c) limits the number of signs on a sexually oriented business to two, limits the size of one of the signs to forty square feet and prescribes the content of both signs.

Regulation of signs has long been an appropriate subject of local zoning regulations. State v. Miller, 83 N.J. 406 (1980); United Advertising Corp. v. Metuchen, 42 N.J. 1 (1964); Napierkowski v. Gloucester Tp., 29 N.J. 481 (1959); Berg Agency v. Maplewood Tp., 163 N.J. Super. 542 (Law Div. 1978); Schoen v. Hillside Tp., 155

N.J. Super. 286 (Law Div. 1977); Farrell v. Teaneck, 126 N.J. Super. 460 (Law Div. 1974); see also Bd. of Adj. v. Osage Oil & Transp., Inc., 522 S.W. 2d 836, 837 (Ark.), cert. denied and app. dism'd, 423 U.S. 941, 96 S. Ct. 350, 46 L. Ed. 2d 273 (1975) ("[I]t would be a waste of time and effort to cite the cases" that say a municipality has the power to regulate the "size and location of billboards and other commercial signs."). Concurrent with the right to operate a business within this State is the "right to maintain a business sign on the premises subject to reasonable regulations." United Advertising Corp. v. Borough of Raritan, 11 N.J. 144, 150 (1952) (Brennan, J.) (distinguishing billboards and on-premises signs) (emphasis added). The Government may regulate and limit the content of these advertisements. Lehman v. City of Shaker Heights, 418 U.S. 298, 303, 94 S. Ct. 2714, 2717, 41 L. Ed. 2d 770, 777 (1974); SDJ, Inc. v. City of Houston, supra (837 F.2d at 1278); Borrago v. City of Louisville, 456 F. Supp. 30, 32 (W.D. Ky 1978).

N.J.S.A. 2C:34-7(c) addresses only commercial speech. Subsection (c) of the statute was enacted in conjunction with a wide variety of regulations aimed at ameliorating the secondary effects of sexually oriented businesses. These regulations prohibit the use of private booths, restrict the

location of sexually oriented businesses within a community and prescribe buffering standards. As we interpret N.J.S.A. 2C:34-7(c), its predominant purpose is to strike a balance between the right of sexually oriented businesses to reasonably announce their presence to potential patrons and the legislative perception that sexually oriented signage on a large scale creates distractions which interfere with traffic safety. Subsection (c) also reinforces the statutory prohibition against minor children frequenting these businesses. Moreover, as we note infra, this section was part of a legislative package aimed at other police power concerns. We can find nothing in the legislative history to suggest that the Legislature intended to curb political or noncommercial speech, and as we read the statute it does not.

While the Legislature may single out sexually oriented businesses as a basis for regulating commercial speech, this form of speech is protected under the First Amendment if it is not misleading and pertains to lawful activity. Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York, 447 U.S. 557, 561, 100 S. Ct. 2343, 2348-2349, 65 L. Ed. 2d 341, 348 (1980); Matter of Anis, 126 N.J. 448, 456, cert. denied, sub nom. Anis v. N.J. Committee on Attorney Advertising, 504 U.S. 956, 112 S. Ct 2303, 119

L. Ed. 2d 225 (1992). Even protected commercial speech may be regulated if the regulation "directly advance[s] a substantial government interest" and is "appropriately tailored to that purpose." Matter of Anis, supra (126 N.J. at 456) (citing Peel v. Attorney Disciplinary Comm., 496 U.S. 91, 100, 110 S. Ct. 2281, 2287, 110 L. Ed. 2d 83, 94 (1990)).

The regulation of signs and billboards has long been recognized as serving the government's substantial interest in traffic safety. See Metromedia Inc. v. San Diego, 453 U.S. 490, 509, 101 S. Ct. 2882, 2893, 69 L. Ed. 2d 800, 816 (1981); Railway Express Agency, Inc. v. New York, 336 U.S. 106, 109, 69 S. Ct. 463, 93 L. Ed. 533 (1949); Arlington Cty. Republican Com. v. Arlington Cty., 983 F. 2d 587, 594 (4th Cir. 1993). In fact, sign restrictions directed specifically at sexually oriented businesses have been upheld in the interest of preserving neighborhoods and protecting minors. See SDJ, Inc. v. City of Houston, supra (837 F.2d at 1280); Borrago v. City of Louisville, supra (456 F. Supp. at 33). Such businesses have been found to have deleterious effects on minors by promoting juvenile delinquency, contributing to an overall increase in crime, leading to the general deterioration of neighborhoods, and lowering property values. See SDJ, Inc. v. City of

Houston, supra (837 F.2d at 1280); Borrago v. City of Louisville, supra (456 F. Supp. at 31).

The Legislature was presumably responding to these concerns in enacting the package of bills that included what became N.J.S.A. 2C:34-7. See, Renton v. Playtime Theatres, Inc., 475 U.S. 41, 51, 106 S. Ct. 925, 931, 89 L. Ed. 2d 29, 40 (1986). On the legislative record, objective lawmakers could reasonably conclude that sexually oriented businesses are associated with higher crime rates and cause a deterioration in the quality of neighborhood life. By isolating these businesses through dispersal, perimeter buffers, and signage restrictions included in L. 1995, c. 230, they addressed these legitimate concerns while still allowing these businesses to advertise and operate.

A statute regulating commercial speech cannot be substantially broader than necessary. Matter of Anis, supra (126 N.J. at 456) (citing Peel v. Attorney Disciplinary Comm., supra (496 U.S. at 100, 110 S. Ct. at 2287, 110 L. Ed. 2d at 94). But in addressing substantial needs, the government must be afforded "a reasonable opportunity to experiment with solutions to admittedly serious problems." City of Pasco v. Rhine, 753 P. 2d 993, 997 (Wash. App.

1988)[5] (quoting Renton v. PlaytimeTheatres, Inc., supra

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[5] In City of Pasco v. Rhine, 753 P.2d 993 (Wash. App. 1988), the court upheld a municipal ordinance which restricted signs advertising sexually explicit movie theaters. Id. at 994. Among the restrictions were:

> 4. There shall not be visible to passerby standing anywhere outside the building any drawings, pictures, and other illustrative material.
>
> . . . .
>
> 7 . Informational material on the building, including the sign/reader board, shall be limited to the name of the theater, ownership information, a designation or identification that adult films are showing, the days and hours of its operation, and the titles of any films showing or coming attractions.

The ordinance was directed at advertising of sexually explicit movie theaters. Id. at 994. The court adopted the Young v. American Mini Theatres, Inc., supra (427 U.S. at 70-71, 96 S. Ct. at 2452-2453, 49 L. Ed. 2d at 326), rationale that the government can classify "based upon the sexually explicit content of the activity or expression involved, and differing treatment accorded such speech by certain locational restrictions, was a valid time, place, and manner restriction," and concluded that the sign restriction's purpose was only to regulate commercial speech such as advertising and consequently applied the Metromedia Inc. v. San Diego, supra (453 U.S. at 507, 101 S. Ct. at 2892, 69 L. Ed. 2d at 815); Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York, supra (447 U.S. at 566, 100 S. Ct. at 2351, 65 Ed. 2d at 351), test of commercial speech. Id. at 996.

(475 U.S. at 52, 106 S. Ct. at 931, 89 L.Ed. 2d at 41) (quoting Young v. American Mini Theatres, Inc., S. Ct. (427 U.S. at 71, 96 S. Ct. at 2452, 49 L. Ed. 2d at 327)).

There must be a "rational relationship between limiting advertising ... and the substantial interest [the government] has in mitigating the secondary impacts...." City of Pasco v. Rhine, supra (753 P.2d at 997) (emphasis added).

N.J.S.A. 2C:34-7(c) is not substantially broader than necessary. The two sign limitation is justified given the undesirable secondary effects that such signs attract, e.g., higher incidents of crime, child delinquency. See Borrago, supra (456 F. Supp. at 33); Dover News, Inc. v. City of Dover, 381 A.2d 752, 755-56 (N.H. 1977). Indeed, the statute has "stopped short of fully accomplishing its ends. It has not prohibited all [signs] .... " Metromedia, Inc. v. San Diego, supra (453 U.S. at 508, 101 S. Ct., at 2898, 69 L. Ed., 2d at 815). See SDJ, Inc. v. City of Houston, supra (837 F. 2d 1268); compare Basiardanes v. City of Galveston, 682 F.2d 1203 (5th Cir. 1982) (total ban on outside advertising impermissible). Not only does the statute allow two signs to be posted but it in no way proscribes other modes of advertisement. Additionally, the statute does not inhibit in any way the material that may be displayed within the store nor does it place any significant

limitation on what may be advertised upon the business's two signs.[6]

II.

The Law Division also held the statute void for vagueness. The State took the position in the trial court that an "identification sign" as designated in the statute pertained to "name only" signs. The judge found that "identification" could mean more than name only, and therefore was impermissibly vague. On appeal the State concedes that the word "identification" connotes more than the name of the establishment.

The vagueness doctrine is premised on the notion that the law must "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. "Grayned v. City of Rockford, 408 U.S. 104, 108, 92 S. Ct. 2294, 2298, 33 L. Ed. 2d 222, 227 (1972). A common sense approach is required in

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[6] We would not construe the sign requirements to prohibit affixing the usual street numbers on the property required by federal postal regulations in addition to the two signs specified in subsection (c), or even the posting of temporary political signs. See State v. Mortimer, 135 N.J. 517, 533-534, cert. denied, ___ U.S. ___ 115 S. Ct. 440, 130 L. Ed. 2d 351 (1994); Town Tobacconist v. Kimmelman, 94 N.J. 85, 104 (1983).

reading the legislative enactment, SDJ, Inc. v. City of Houston, supra (837 F.2d at 1278), in terms of the persons who may be subject to it, Town Tobacconist v. Kimmelman, 94 N.J. 85, 118-120 (1983), and read it in context with its intended purpose. State v. Cameron, 100 N.J. 586, 591 (1985). It is our duty to endeavor to interpret a statute so that it may comply with constitutional requirements.

As we interpret N.J.S.A. 2C:34-7(c), an identification sign may communicate not only the name of the establishment, but also the street number, telephone number, operating hours and general nature of the establishment in order to identify the business. Such a requirement is not vague.

Affirmed.

I hereby certify that the
foregoing is a true copy of the
original on file in my office.
s/R. Emille Cox
Clerk

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SUPERIOR COURT
OF NEW JERSEY
LAW
DIVISION:MERCER
COUNTY

Docket No.
MER-L-3693-95

Civil Action

FINAL JUDGMENT
WITH
PERMANENT
INJUNCTION

HAMILTON AMUSEMENT
CENTER
t/a VIDEO EXPRESS, L.O.J.,
INC.
t/a THE EMPORIUM, PYNCO,
INC.,
t/a CAMELOT BOOK STORE,
and
CRESCENDO BOOK, INC.,
t/a CARNIVAL BOOKS,

Plaintiffs,

vs.

DEBORAH T. PORITZ,
Attorney General for the State of

New Jersey and
STATE OF NEW JERSEY,

Defendants.

THIS MATTER being opened to the Court upon the return date of an Order to Show Cause by the Plaintiffs, Hamilton Amusement Center, t/a Video Express; L.O.J., Inc. t/a The Emporium; Pynco, Inc. t/a Camelot Book Store; and Crescendo Book, Inc. t/a Carnival Books; to determine the constitutionality of and for certain injunctive relief from enforcement of P.L. 1995, C. 230; Plaintiffs appearing through counsel. Paul J. Cambria, Jr., Barry Nelson Covert and Steven S. Polinsky (Lipsitz, Green, Fahringer, Roll, Salisbury & Cambria, LLP and Steven S. Polinsky, attorneys) in the presence of the attorney for the Defendants, Deborah T. Poritz, Attorney General of the State of New Jersey (Janine L. Long, Deputy Attorney General, appearing) and the Court having reviewed the complaint, certifications and briefs of counsel filed in support of and in opposition to the relief sought by the Plaintiffs; and the Court having heard the arguments of counsel;

AND IT APPEARING to the Court, after inquiring of counsel for all parties, that no further proceedings are required in this matter and that the Court may dispose of

the matter as provided by R. 4:67-5;

AND IT FURTHER APPEARING to the Court that Plaintiffs have satisfied the requirements for the relief sought, as set forth at length in the Opinion of the Court dated October 27, 1995, the contents of which are incorporated herein by reference; and good cause existing for the entry of this Order and Final Judgment.

IT IS on this 19th day of December, 1995

ORDERED and ADJUDGED that P.L. 1995, C. 230, Sec. I (N.J.S. 2C:34-2.3c) be, and the same is, declared unconstitutional; and it is further

ORDERED and ADJUDGED that the Defendants State of New Jersey and Deborah T. Poritz, Attorney General of the State of New Jersey are permanently restrained and enjoined from enforcing the provisions of P.L. 1995, C. 230, Sec. 1 (N.J.S. 2C:34-2.3c); and it is further

ORDERED that a true copy of this Order shall be served upon Counsel for all parties within 7 days from the date of this Order.

s/ Hon. Philip S. Carchman
HON. PHILIP S. CARCHMAN, A.J.S.C.

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - MERCER COUNTY
DOCKET NO. MER-L,3693-95

HAMILTON AMUSEMENT CENTER, INC., t/a Video Express, L.O.J., INC., t/a The Emporium, PYNCO, INC., t/a Camelot Bookstore, and CRESCENDO BOOK, INC., t/a Carnival Books

Civil Action

Plaintiffs,

v.

AMENDED OPINION

DEBORAH T. PORITZ, ATTORNEY GENERAL FOR THE STATE OF NEW JERSEY and THE STATE OF NEW JERSEY

Defendants.

Decided: October 27, 1995

Paul J. Cambria, Jr., of the New York Bar, for plaintiffs (Lipsitz, Green, Fahringer, Roll, Salisbury & Cambria, LLP, attorneys; Cherie L. Peterson and Barry Nelson Covert, of the New York Bar, and Steven J. Polinsky, on the briefs).

Janine L Long, Deputy Attorney General, for defendant

(Deborah T. Poritz, Attorney General of New Jersey, attorney, Ms. Long, on the brief).

CARCHMAN, A.J.S.C.

This matter comes before the court on plaintiffs' application for preliminary injunctive relief barring enforcement of N.J.S.A. 2C:34-7c. This newly enacted statute restricts the number, size and content of signs that may be posted outside sexually oriented businesses. Plaintiffs, retailers offering a variety of adult materials including books, magazines and videos for sale, filed a declaratory judgment action seeking to have N.J.S.A. 2C:34-7c declared unconstitutional. For the reasons set forth below, this court finds that plaintiff has established the factors required for preliminary injunctive relief under Crowe v. DeGioia, 90 N.J. 126 (1982) and, accordingly, enters a preliminary injunction barring defendant from enforcing the statute.

The facts in this case are neither complex nor disputed. On August 16, 1995, the New Jersey Legislature acted to amend N.J.S.A. 2C:34-2 effective September 16, 1995. The amendment, eventually codified at N.J.S.A. 2C:34-7, regulates exterior signage at "sexually oriented businesses," and provides, inter alia:

> c. No sexually oriented business shall

> display more than two exterior signs, consisting of one identification sign and one sign giving notice that the premises are off limits to minors. The identification sign shall be no more that 40 square feet in size.
>
> d. A person who violates this section is guilty of a crime of the fourth degree. [N.J.S.A. 2C:34-7c,d.]

Plaintiffs all deal in adult materials, and, through their principals, have certified that they already employ signage which far exceeds the limitations imposed by N.J.S.A. 2C:34-7c with regard to both number and size. With regard to content, their signs include information such as the types of products sold, the location of the entrance and hours of business.

Plaintiffs challenge the constitutionality of the signage restrictions under both the First Amendment of the United States Constitution, and Article I, Paragraph 6 of the New Jersey Constitution. Plaintiffs also assert the new law violates their right to equal protection because it singles out sexually oriented businesses and is underinclusive. Plaintiffs finally urge that the law is unconstitutionally vague because it fails to define "identification."

The New Jersey Supreme Court has addressed issues of signage in State v. Miller, 83 N.J. 402 (1980). There, the

Borough of Milltown adopted an ordinance requiring a permit before any sign greater than six square feet could be placed in a residential area. The ordinance also specified permissible types of messages. Political messages were not included. Miller was convicted for violation of the ordinance after displaying a four by eight foot sign on his front lawn sarcastically welcoming prospective residents "...TO THIS FLOOD AREA. GOOD LUCK!! INFORMATION AVAILABLE." The Court struck down the ordinance as unconstitutional.

The Court recognized the legitimate goals of the ordinance were the maintenance of aesthetic charm in residential neighborhoods and the preservation of property values, pursued "under the zoning component of the police power to promote general health, safety and welfare of the community." Miller, 83 N.J. at 407. Despite the legitimacy of the Borough's goals, the ordinance precluded a property owner:

> [F]rom communicating any other than an extremely limited message by the use of stationary signs on his or her property. In particular, the ordinance's restrictions on the manner and place of defendant's speech, so severe as to amount to an absolute ban on political speech, offend the First Amendment. [Id. at 411.]
>
> . . . .

> Because the ordinance so directly cuts to the heart of the First Amendment, we decline to perform judicial surgery or to adopt a narrow construction in an effort to save it. The ordinance is unconstitutional on its face. [Id. at 414.]

Justice Clifford, speaking for the Court, recognized that some regulation of signs may be permissible "if within constitutional limits," id. at 414, and offered comments on the permissible scope of sign regulation:

> To withstand the strict constitutional scrutiny required here, the restriction on signs must be tied to a compelling municipal interest as well as to the uses permitted in a given zone...
> ...
>
> ...[The municipality] must show that the particular restrictions on signs in fact relate to the stated goal. [Id. at 414-155.]

While commercial speech is afforded some protection, a local government may distinguish between commercial and political speech in imposing restrictions on signs. Id.

> It should be emphasized however, that the regulation of sign content must be limited to a general distinction between commercial speech as tied to commercial uses permitted in a given zone, and political speech which is and must be permitted everywhere. Specific types of speech or particular messages may not be prohibited...

> Limitations on the size of a sign may be imposed if the allowable square footage is not determined in an arbitrary manner. The size limits, if any, must be large enough to permit viewing from the road, both by persons in vehicles and on foot. Inadequate sign dimensions may strongly impair the free flow of protected speech. [Id. at 416.]

Some of the principles articulated in State v. Miller were echoed and embellished in Bell v. Stafford Tp., 110 N.J. 384 (1988). There, a local ordinance banned all billboards in the municipality. The Court found there was no nexus between a government interest and the broad scope of the law. The ban unnecessarily restricted speech.

> Consistent with the judicial predisposition in favor of the validity of legislation, courts will readily impute a proper governmental purpose or interest as the object to be served by the enactment, and, if need be, infer an adequate basis to support legislative regulations, even in the absence of particular purposes or specific findings being expressed by the lawmakers. Hutton Park Gardens v. West Orange Town Council, 68 N.J. at 564-65; Burton v. Sills, 53 N.J. 86, 95 (1968).
>
> Nevertheless, if an enactment directly impinges on a constitutionally protected right, the presumption in favor of its validity disappears. Courts are for more demanding of clarity, specificity and

> restrictiveness with respect to legislative enactments that have a demonstrable impact on fundamental rights. See State v. Cameron, 100 N.J. 586, 592 (1985); Paton v. LaPrade, 469 F.Supp. 773, 778 (D.N.J. 1978) [Bell v. Stafford Tp., supra, 110 N.J. at 394-95.]

The municipality has the burden of articulating tangible, specific objectives of any ordinance that infringes on a fundamental right. Id. However, that articulation need not be in the ordinance itself; the municipality may offer testimony at a court hearing held to determine the constitutionality of the ordinance. Id.

> Thus, an ordinance that substantially curtails freedom of expression clearly requires that the municipality shoulder the burden of proving its constitutional validity. The municipality must satisfactorily demonstrate a legitimate governmental interest that is to be served by the enactment and demonstrate a reasonable factual basis indicating that the regulation advances that governmental interest and is no more expansive than necessary in advancing that interest. See Metromedia, Inc. v. San Diego, supra, 452 U.S. 490, 101 S.Ct. 2882, 69 L. Ed. 2d 800; State v. Miller, supra, 83 N.J. 402. [Bell v. Stafford Tp., supra, 110 N.J. at 395.]

The Court indicated that even if it assumed there was a legitimate governmental interest behind the billboard ban, the township had failed to demonstrate a factual basis for such a broad restriction as a municipal-wide ban, which prevented all kinds of speech, including noncommercial. The Court also found the township had failed to show that viable alternative means of communication were left open to Bell. Id. at 396-97.

The New Jersey Constitution furnishes an independent basis for protecting individual rights of free speech and may provide greater protection than that provided by the U.S. Constitution. State v. Schmid, 84 N.J. 535, 553 (1980); see also, Pruneyard Shopping Center, 447 U.S. 74, 79-80, 100 S.Ct. 2035, 2039-40, 64 L. Ed.2d 741, 752 (1980). Even where the state and federal constitutional language is identical, states have the right to construe a state constitutional provision in accordance with what the courts of that state perceive to be its plain meaning. State v. Schmid, supra, 84 N.J. at 555.

The New Jersey Supreme Court has identified a "basis for finding exceptional vitality in the New Jersey Constitution with respect to individual rights of speech and assembly" in the language employed. Id. at 557. Our Constitution affirmatively recognizes these freedoms in

language more sweeping in scope than that of the First Amendment:

> Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or of the press. [N.J.Const. (1947), Art. I, par. 6.]

> The people have the right freely to assemble together, to consult for the common good, to make known their opinions to their representatives, and to petition for redress of grievances. [N.J.Const. (1947), Art. I, par. 18.]

The explicit affirmation of these fundamental rights in the state constitution can be seen as a guarantee of those rights, directly enforceable without implementing legislation, and imposing upon the State government an affirmative obligation to protect them. State v. Schmid, supra, 84 N.J. at 558-59.

Commercial speech enjoys constitutional protection so long as it is not misleading and pertains to legal activity. Barry v. Arrow Pontiac, Inc.,100 N.J. 57, 72-73 (1985); see also, Central Hudson Gas and Electric Corp. v. New York Public Service, 447 U.S. 557, 100 S.Ct. 2343, 65 L. Ed. 2d 341 (1980). However, it is accorded less protection than other constitutionally-guaranteed expression. Barry v.

Arrow Pontiac, Inc., supra, 100 N.J. at 72-72; Central Hudson Gas, supra, 447 U.S. at 563; 100 S.Ct. at 2350. As the offspring of self-interest, commercial speech is considered hardy and not particularly susceptible to being crushed by overbroad regulation. Id. Nonetheless, where commercial speech is neither misleading nor concerns illegal activity, it is constitutionally protected and, under challenge, it must be determined "whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than necessary to serve that interest." Barry v. Arrow Pontiac, Inc., supra, 100 N.J. at 73 (quoting Central Hudson Gas, supra).

States and local governments may restrict the size, location and content of signs without offending either the New Jersey or federal Constitutions. Aesthetic considerations, property value and traffic safety are among the reasons a local government may choose to impose such regulation. See e.g., State v. J.& J. Painting, 167 N.J.Super. 384 (App. Div. 1979); Schoen v. Township of Hillside, 155 N.J. Super. 286 (Law. Div. 1977) (cited approvingly in State v. Miller, supra). A government may also restrict signage relating to sexually oriented businesses to reduce or avoid adverse secondary effects of those businesses. SDJ, Inc. v. City of Houston, 636 F.Supp.

1359, aff'd, 837 F.2d 1268 (5th Cir. 1988), cert. denied, 489 U.S. 1052, 109 S.Ct. 1310, 103 L.Ed.2d 579 (1989). As with other forms of protected speech, the government seeking to regulate signage must articulate a legitimate government interest to be advanced by the restrictions, and the restrictions must be narrowly tailored to serve that interest and must leave open other channels of communication. State v. Miller, supra, SDJ, supra, 837 F.2d at 1273.

In SDJ, Houston adopted an ordinance requiring permits for topless bars, restricting their proximity to schools and churches, and to one another, and regulating signage. The signage portion restricted the number, size, and content of signs, and prescribed the type of lettering to be used. Although the regulation severely restricted the freedom of topless bars, the ordinance was upheld. Houston held hearings which included expert testimony, and the preamble to the ordinance cites protection of property values, churches, schools, the mental health of minors who come in contact with adult material on nightclub signs, as well as the undesired criminal element attracted to such places as reasons for the law. The Houston zoning authority properly identified a legitimate state concern and tailored its ordinance accordingly. The legislative history of N.J.S.A.

2C:34-7c is less compelling. There were neither factual hearings nor a factual basis to establish the legitimacy of the asserted state interest or the existence of secondary effects.

The limitation of signs at sexually oriented businesses to "identification" only, excluding any other messages such as political ones, supports the conclusion that the statute is content-based. Because it is content-based, it is presumptively unconstitutional. State v. Miller, supra, 83 N.J. 402.

The language of the statute is plain and simple and disallows any signs containing messages other than "identification" and a notice of inaccessibility to minors. Plaintiffs' attorney conceded at oral argument that plaintiffs' constitutional claim would be significantly diminished if the prohibition of speech was not so broad as to encompass all messages save "identification." The restrictions at issue here are similar to those in State v. Miller. Like the ordinance in Miller, this statute lists limited permissible messages, effectively precluding all others such as highly protected political ones.

To be found constitutional, the law must survive the strict scrutiny prescribed in State v. Miller, supra, 83 N.J. at 414-15. This court must determine whether the law was

motivated by a compelling state interest. The legislative record supplied to the court by defendant includes a position report submitted by Concerned Women for America supporting the then-proposed law. tHe report suggests, and lists some statistical support, for the proposition that violent, sexually explicit material encourages violent crime, but it makes no mention of the specific secondary effects allegedly targeted by the statute: traffic hazard and potential harm to minors. The other document supplied by defendant is a copy of the speech made by the legislation's co-sponsor ("the sponsor") on December 15, 1994. The text of her speech is as follows:

> Thank you, Mr. Speaker. I rise today to urge you to vote for the Assembly Committee Substitute to A-252/842 and to offer floor amendments.
>
> The amendments would make this committee substitute consistent with Senate Bill 342, sponsored by Senator Gormley.
>
> This legislation regulates the operations of sexually oriented businesses, such as "juice bars." These establishments would not be allowed to operate within 1,000 feet of any school, playground, park or place of worship, or within 1,000 feet of any residential area.

This bill does not affect the right of municipalities to adopt zoning ordinances establishing so-called "combat" zones for the clustering of sexually oriented businesses.

Additionally, the bill mandates the external appearance of sexually oriented businesses be surrounded by 50-foot wide perimeter buffers made up of plantings, and limits the number of signs.

This 50 foot distance restriction would help to preserve neighborhoods and to prevent urban blight.

The buffer plantings would help to establish a distance between businesses and minors who may be in the area. These would also eliminate embarrassment by citizens who might be walking by.

Sign restrictions would be advantageous because multiple signs distract motorists and cause accidents.

This bill also addresses the use of prohibited enclosures or private booths for the purpose of viewing pornographic motion pictures, and other photographic representations which depict or describe sexual activity. This prohibition would help to prevent sexually transmitted diseases.

Violators would be guilty of a crime of the fourth degree, which is punishable by a term of imprisonment of up to 18 months or

a fine of up to $7,500 or both.

> We need to put the brakes on these sorts of element [sic] in all municipalities in the State of New Jersey. Parents are concerned about their children being exposed to these types of perverted establishments and their sordid activities.
>
> Owners of these businesses need to know that they will not be able to break the law and get away with it.
>
> I ask for your favorable consideration of this bill and the amendments. Thank you. [Emphasis added.]

Beyond these two documents, defendant asserted at oral argument, there may have been some testimony in the legislative process, but no notes or recording was made, and no one has been identified who can remember what was said, or when.

This court finds that defendant has failed to articulate a compelling state interest. No mention is made of the Concerned Women of America's position report in the legislative materials and it is unclear to what extent, if any, this report influenced the legislators. The sponsor's speech largely describes the proposed legislation, but does not clearly articulate any purpose that could be attributable to the legislature as a whole. Although her

speech does refer to the protection of minors and traffic safety, and these are unquestionably significant state interests that could support regulation of signage, there are no findings to support the proposition that signs at sexually oriented businesses are a significant traffic hazard or that these signs are of particular concern where the health and welfare of minors is concerned.

The sponsor's speech, in its reference to "put[ting] the brakes on these sorts of element[s]," suggests that the objective of the statute is not to deal with secondary effects, but rather to eliminate sexually oriented businesses. This court will not project the sponsor's speech onto the legislature as a whole, with regard to either permissible or impermissible objectives of state government. One legislator's speech may not reflect the motivations of the legislature as a whole. "What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork." City of Renton v. Playtime Theatres, 475 U.S. 41, 48, 106 S.Ct. 925, 929, 89 L. Ed.2d 29 (1986).

The statute suffers from other infirmities as well which are made more apparent by the lack of a factual predicate. The dimensional restrictions articulated in the statute are

arbitrary, in contravention of the New Jersey Supreme Court's directive contained in State v. Miller, supra, 83 N.J. at 414. The record is devoid of any suggestion that the legislature considered the issue of adequate visibility of plaintiff's signs prior to enactment. Miller plainly requires such an inquiry. Under the statute, a non-sexually oriented retailer of books, magazines and videos could display signs of unlimited size, number and content whereas the sexually oriented retailer next door, displaying an identification sign with its name only, would be limited to one sign of forty square feet. Such a result is inconsistent with Miller.

While a governing body may identify legitimate reasons to enact laws similar to the one at issue here, none has been demonstrated in this case.

> [W]e intrude into the regulatory decision process to the extent that we insist upon objective evidence of a purpose - a study or findings. Insisting upon findings reduces the risk that a purported effort to regulate effect is a mask for regulation of content. [SDJ, supra, 837 F.2d at 1274.]

Even if this court determined that N.J.S.A. 2C:34-7c is content-neutral, the statute would fail. City of Renton v. Playtime Theatres, supra, held that "zoning ordinances designed to combat the undesirable secondary effects of

such business [that purvey sexually explicit materials] are to be reviewed under the standards applicable to "content-neutral" time, place and manner regulations." Id., 106 S.Ct. at 929. This test requires a court determine whether (1) the regulation is justifiable without reference to the content of the regulated speech, (2) whether the regulation is narrowly tailored to serve a substantial governmental interest, and (3), whether the regulation leaves open ample alternative means of communication. City of Renton, supra, 475 U.S. at 47-51, 106 S.Ct. at 928-31. Assuming the law was enacted to protect against the secondary effects of sexually oriented businesses, N.J.S.A. 2C:34-7c is not narrowly tailored to serve those interests. A ban of all communication save "identification" is not necessary to preserve traffic safety, especially on a state-wide basis; moreover, defendant asserted at oral argument that "identification," which is undefined in the statute, means "name only." While there are legitimate questions as to defendant's interpretation of that statute, such an interpretation would unduly suffocate speech.

In Basiardanes v. City of Galveston, 682 F.2d 1203 (5th Cir. 1982), the Fifth Circuit struck down an ordinance which had a similarly broad effect as the one before this court, as interpreted by defendant. The city enacted a total

prohibition on advertising sexually oriented businesses in any public place. Basiardanes posted a sign indicating his intent to bring adult entertainment to downtown Galveston. "The sign had borne nothing more than the legend 'Adult Theater.'" Id. at 1218. The trial court heard testimony that indicated a municipal goal of shielding the public from lurid advertisement, and while the court acknowledged the importance of that goal, particularly where minors are concerned, it concluded the interest was not served narrowly. "The ordinance, as written, prohibits even a simple sign announcing the existence of an adult theater." Id. at 1219. "Such a restraint goes far beyond the City's legitimate interest." Id. Notably, in Berg Agency v. Township of Maplewood, 163 N.J. Super. 542 (Law Div. 1978), allowing realty "for sale" signs only without the realtor's name was too restrictive.

To the extent "identification" means something other than "name only," the statute is too vague. This court will not engage in creative construction of the term in order to save the statute.

There are no adequate alternative avenues of communications open to plaintiffs for either political speech or commercial. In State v. Miller, supra, 83 N.J. at 413, avenues other than signage were considered inadequate for

political speech, and they are in this case as well. The alternatives suggested by defendant are inadequate.

In sum, N.J.S.A. 2C:34-7c proscribes all messages except identification and exclusion of minors. It is content-based and presumptively unconstitutional. Defendant has failed to demonstrate that it was enacted to further a compelling state interest, or that it was narrowly tailored. This court finds N.J.S.A. 2C:34-7c unconstitutional under the New Jersey Constitution, Article I, paragraph 6.

Under Crowe v. DeGioia, 90 N.J. 126 (1982) plaintiffs are entitled to the injunctive relief they seek if (1) they demonstrate a probability of eventual success on the merits of the claim, (2) there is a threat of immediate and irreparable harm to them, and (3) the relief will not create an undue hardship on defendant. Plaintiffs have demonstrated a probability of success on the merits, and maintaining the status quo will not create an undue hardship on the State. Free speech rights are so important that little or no additional showing is needed to find a threat of irreparable harm. New York Times Co. v. United States, 403 U.S. 713, 81 S.Ct. 2140, 29 L. Ed.2d 822 (1971). Plaintiff is hereby preliminarily enjoined from enforcing N.J.S.A. 2C:34-7c.

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Plaintiffs,

vs.

DEBORAH T. PORITZ, ATTORNEY GENERAL FOR THE STATE OF NEW JERSEY and THE STATE OF NEW JERSEY,

Defendants.

SUPERIOR COURT OF NEW JERSEY LAW DIVISION : MERCER COUNTY

Docket No.

Civil Action

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiffs, by and through their attorneys, for their complaint against the defendants above-named, allege upon information and belief, as follows:

INTRODUCTION

1. Plaintiffs commence this action for declaratory and injunctive relief to restrain and enjoin defendants, their agents and employees, from enforcing recent legislation amending New Jersey Statutes 2C:34-2 and supplementing Chapter 34 of Title 2C of the New Jersey Statutes which inter alia, prohibits "sexually oriented businesses" from displaying more than two exterior signs, consisting of one "identification" sign no more than forty square feet in size and one sign giving notice that the premises are off limits to minors, in violation of plaintiffs' rights guaranteed by the First and Fourteenth Amendments to the United States Constitution and Article I, Section 6 of the New Jersey Constitution (the statutory amendments are annexed as Exhibit A).

JURISDICTION

2. This action is commenced pursuant to the authority of Title 42, United States Code, Section 1983 and New Jersey Statutes 2A:16-52 and 2A:16-53, as the amendments violate

plaintiffs' rights to freedom of speech guaranteed by the First and Fourteenth Amendments to the United States Constitution and Article I, Section 6 of the New Jersey Constitution and plaintiffs' right to equal protection of law guaranteed by the Fourteenth Amendment to the United States Constitution.

PARTIES

3. Plaintiff, Hamilton Amusement Center t/a Video Express is a New Jersey corporation operating a retail sales establishment at 1030 State Highway, Route 33, Hamilton Township, New Jersey 08690. The business offers for sale a variety of magazines, books and videotapes, including adult materials.

4. Plaintiff, L.O.J., Inc. t/a The Emporium is a New Jersey corporation operating a retail sales establishment at 245 Route 130/206, Bordentown, New Jersey 08505. The business offers for sale a variety of magazines, books and videotapes, including adult materials.

5. Plaintiff, Pynco, Inc. t/a Camelot Book Store is a New Jersey corporation operating a retail sales establishment at 1103 U.S. 130 North Burlington, New Jersey 08016. The business offers for sale a variety of magazines, books and videotapes, including adult materials.

6. Plaintiff, Crescendo Book, Inc. t/a Carnival Books is a

New Jersey corporation operating a retail sales establishment at 705 Crescent Boulevard, Brooklawn, New Jersey 08030. The business offers for sale a variety of magazines, books and videotapes, including adult materials.

7. Defendant, Deborah T. Poritz, is the Attorney General for the State of New Jersey, and, as such, is responsible for the enforcement of the laws of the State of New Jersey.

8. Defendant State of New Jersey is the entity which enacted the statute challenged by this action.

9. At all times relevant hereto, defendants have acted under color of statute, regulation, custom or usage of the State of New Jersey.

ALLEGATIONS

10. On or about August 16, 1995 the State of New Jersey enacted amendments to New Jersey Statutes 2C:34-2 entitled "Obscenity for Persons 18 Years of Age or Older" and supplementing Chapter 34 of Title 2C of the New Jersey Statutes by adding 2C:34-2.2 and 2C:34-2.3. These amendments and additions provide that no sexually oriented business shall display more than two exterior signs, consisting of one identification sign, no more than forty square feet in size, and one sign giving notice that the premises are off limits to minors. N.J.S.A. 2C:34-2.3c.

11. The statute fails to define what is covered by the

term "identification sign".

12. A "sexually oriented business" is defined 2C:34-2.2a(l) as:

(a) A commercial establishment which as one of its principal business purposes offers for sale, rental or display any of the following: books, magazines periodicals or other printed material, or photographs, films, motion pictures, video cassettes, slides or other visual representations which depict or describe a "specified sexual activity" or "specified anatomical area"; or still or motion picture machines, projectors or other image-producing devices which show images to one person per machine at any one time, and where the images so displayed are characterized by the depiction of a "specific sexual activity" or specified anatomical area" ; or instruments, devices, or paraphernalia which are designed for use in connection with a "specified sexual activity"; or

(b) A commercial establishment which regularly features live performances characterized by the exposure of a"specified anatomical area"

or by a "specified sexual activity" or which regularly shows films, motion pictures, video cassettes, slides or other photographic representations which depict or describe a "specified sexual activity" or "specified anatomical area".

13. "Specified anatomical area" is defined as "[l]ess than completely and opaquely covered human genitals, pubic region, buttock or female breasts below a point immediately above the top of the areola"; or "[h]uman male genitals in a discernibly turgid state, even if covered". 2C:34-2.2c(l) and (2).

14. "Specified sexual activity" is defined as "[t]he fondling or other erotic touching of covered or uncovered human genitals, pubic region, buttock or female breast"; or "[a]ny actual or simulated act of human masturbation, sexual intercourse or deviate sexual intercourse". 2C:34-2.2d(l) and (2).

15. A person who violates this statute is guilty of a crime of the fourth degree.

16. At all times relevant hereto, plaintiffs have two or more than two signs upon their premises, and the aggregate area of those signs exceeds forty square feet.

17. By virtue of this statute, all non-" identification" signs

are completely banned. In addition, the statute bans more than one "identification" sign and any identification sign which is larger than forty square feet.

18. This prohibition on signs is violative of plaintiffs' constitutional rights guaranteed by the First and Fourteenth Amendments to the United States Constitution and Article I, Section 6 of the New Jersey Constitution.

19. Specifically, the statute's bar to all nonidentification signs, more than one "identification" sign, and identification signs exceeding forty square feet operates as an unconstitutional content-based restriction on protected speech which fails to promote a compelling state interest and does not employ the least restrictive means to further any such interest.

20. Neither are such prohibitions narrowly tailored to further any substantial governmental interest and any governmental interest allegedly advanced is not factually supported by the legislative record.

21. Moreover, the statute fails to provide alternative avenues of communication as it wholly bans a recognized forum of expression by prohibiting all non-identification signs and further fails to provide alternative avenues of communication by placing burdensome restrictions on identification signs which stifle the free flow of necessary truthful information.

22. Consequently, the statute impermissibly restrains constitutionally protected speech and virtually destroys an entire mode of on premises communication.

FIRST COUNT

23. Plaintiffs incorporate by references paragraphs "1" through "22" of this complaint as if herein set forth at length.

24. New Jersey Statutes 2C:34-2 bans the communication of constitutionally-protected non-identification messages via signs located upon sexually oriented businesses in violation of plaintiffs' rights guaranteed by the First and Fourteenth Amendments to the United States Constitution and Article I, Section 6 of the New Jersey Constitution.

SECOND COUNT

25. Plaintiffs incorporate by references paragraphs "1" through "24" of this complaint as if herein set forth at length.

26. New Jersey Statutes 2C:34-2 improperly burdens plaintiffs' speech by prohibiting the display of any sign in excess of forty square feet and by limiting plaintiffs to the display of one identification sign and one sign giving notice that the premises are off limits to minors, in violation of

plaintiffs' rights guaranteed by the First and Fourteenth Amendments to the United States Constitution and Article I, Section 6 of the New Jersey Constitution.

THIRD COUNT

27. Plaintiffs incorporate by references paragraphs "1" through "26" of this complaint as if herein set forth at length.

28. New Jersey Statute 2C:34-2 violates plaintiffs' right to equal protection of the laws guaranteed by the Fourteenth Amendment to the United States Constitution by impermissibly treating the speakers of one type of constiutionally-protected speech different from speakers of other types of protected expression.

FOURTH COUNT

29. Plaintiffs incorporate by references paragraphs "1" through "28" of this complaint as if herein set forth at length.

30. New Jersey Statutes 2C:34-2 operates as an unconstitutional prior restraints in violation of plaintiffs' rights guaranteed by the First and Fourteenth Amendments to the United States Constitution and Article I, Section 6 of the New Jersey Constitution.

FIFTH COUNT

31. Plaintiffs incorporate by references paragraphs "1" through "30" of this complaint as if herein set forth at length.

32. New Jersey Statutes 2C:34-2 is impermissibly underinclusive in violation of plaintiffs' rights guaranteed by the First and Fourteenth Amendments to the United States Constitution and Article I, Section 6 of the New Jersey Constitution in that it restricts speech on the basis of the signs' message.

SIXTH COUNT

33. Plaintiffs incorporate by references paragraphs "1" through "32" of this complaint as if herein set forth at length.

34. New Jersey Statutes 2C:34-2 is unconstitutionally vague in that it fails to provide proper notice of the conduct prohibited by the statute and encourages arbitrary and discriminatory enforcement in violation of plaintiffs' rights guaranteed by the Fourteenth Amendment to the United States Constitution as it fails to define the term "identification sign".

SEVENTH COUNT

35. Plaintiffs incorporate by references paragraphs "1

through "34" of this complaint as if herein set forth at length.

36. Enforcement of New- Jersey Statutes 2C:34-2 will result in irreparable harm to plaintiffs if not immediately enjoined in that plaintiffs' freedom of speech guaranteed by the First and Fourteenth Amendments to the United States Constitution and Article I, Section 6 of the New Jersey Constitution will be burdened, restricted and suppressed.

WHEREFORE, plaintiffs respectfully demand judgment as follows:

(1) Declaring that New Jersey Statutes 2C: 34-2 violates the United States and New Jersey Constitutions;

(2) Preliminarily and permanently enjoining and restraining defendants, their agents and employees from enforcing N.J.S.A. 2C:34-2;

(3) Granting plaintiffs the costs and disbursements associated with this action;

(4) Granting plaintiffs reasonable attorneys' fees pursuant to 42 U.S.C. §1988; and

(5) Granting such other and further relief as this Court may deem just and proper under the circumstances.

DATED: September 13, 1995

Respectfully submitted,

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CERTIFICATION PURSUANT TO R. 4:5-1

STEVEN S. POLINSKY hereby certifies:

1. I am local counsel for the Plaintiffs on the Complaint in the within cause of action.

2. Upon information and belief, the matter in controversy is not the subject of any other action pending in any Court or of a pending arbitration proceeding; and no other action or arbitration proceeding is contemplated. At this time the Defendant knows of no other party who should be joined in the action.

I certify that the foregoing statements made by me are true. I am aware that if any of the statements made by me are willfully false, I am subject to punishment.

s/Steven S. Polinsky
STEVEN S. POLINSKY

DATE: September 13, 1995

(3)

Supreme Court, U.S.
FILED
FEB 19 1999
CLERK

No. 98-1089

In the

Supreme Court of the United States

October Term, 1998

HAMILTON AMUSEMENT CENTER t/a VIDEO EXPRESS, L.O.J., INC. t/a THE EMPORIUM, PINCO, INC. t/a CAMELOT BOOK STORE, and CRESCENDO BOOKS, INC. t/a CARNIVAL BOOKS,

Petitioners,

v.

PETER VERNIERO, Attorney General for the State of New Jersey and THE STATE OF NEW JERSEY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

Brief of the Respondents in Opposition

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QUESTIONS PRESENTED

1. Whether the New Jersey statute restricting signage at sexually-oriented businesses is a content-neutral regulation passing constitutional muster under City of Renton v. Playtime Theatres, 475 U.S. 41 (1986).

2. Whether the Supreme Court of New Jersey committed plain error in affirming the determination of the New Jersey intermediate state-appellate court to expand the appellate record to include matters not brought to the attention of the trial court relevant to the factual basis derived from the record before the state legislature for a substantial governmental interest in the signage restrictions.

3. Whether, independent of commercial-speech analysis, New Jersey's statute restricting signage at sexually-oriented businesses is a content-neutral regulation that passes constitutional muster under City of Renton v. Playtime Theatres, 475 U.S. 41 (1986).

4. Whether the alleged errors of the Supreme Court of New Jersey in its findings of fact sustaining respondents' burden of proof under commercial-speech analysis are material when, independent of that analysis, New Jersey's statute limiting signage at sexually-oriented businesses is a content-neutral regulation passing constitutional muster under City of Renton v. Playtime Theatres, 475 U.S. 41 (1986).

5. Whether the phrase "identification sign" as interpreted by the Supreme Court of New Jersey is impermissibly vague in all its applications although the state courts gave it a limiting construction that persons of ordinary intelligence can understand.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

STATUTES AND OTHER PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

REASONS FOR DENYING THE WRIT 7

1. Petitioners' Disputes with the First-Amendment Analysis of the Opinion below Present Two Claims over Which this Court Lacks Jurisdiction And, in Any Event, Present No Questions That Warrant Granting the Writ 7

2. Petitioners' Disputes with the Vagueness Analysis of the Opinion below Present No Question That Warrants Granting the Writ 14

CONCLUSION 15

APPENDIX A-1

Text of N.J.S.A. § 2C:33-12.2 . . . . . A-1

Text of N.J.S.A. § 2C:34-7 . . . . . A-3

Text of New Jersey Court Rule 2:10-5 . . . . . A-4

Text of New Jersey Court Rule 2:11-6 . . . . . A-4

TABLE OF AUTHORITIES

CASES Page

Chez Sez VIII, Inc. v. Poritz, 297 N.J.Super. 331, 688 A.2d 119 (App. Div.), certif. denied, 149 N.J. 409, 694 A.2d 194, cert. denied, --- U.S. ---, 118 S.Ct. 337, 139 L. Ed.2d 262 (1997) 3, 11

City of Renton v. Playtime Theatres, 475 U.S. 41 (1986) 5, 6, 7, 8, 12, 13, 15

Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975) 14

Greater New Orleans Broadcasting Ass'n v. U.S., 149 F.3d 334 (5th Cir. 1998), cert. granted --- U.S. ---, 1999 WL 13527, 67 U.S.L.W. 3191, 67 U.S.L.W. 3449, 67 U.S.L.W. 3456 (U.S. Jan. 15, 1999) 13

United Reporting Pub. Corp. v. California Highway Patrol, 146 F.3d 1133 (9th Cir. 1998), cert. granted --- U.S. ---, 1999 WL 24679, 67 U.S.L.W. 3302, 67 U.S.L.W. 3342, 67 U.S.L.W. 3464, 67 U.S.L.W. 3468 (U.S. Jan. 25, 1999) 13

Young v. American Mini Theatres Inc, 427 U.S. 50 (1976) 14

STATUTES

N.J.S.A. § 2C:33-12.2 . . . . . 1, 2, 3, 5, 6, 9, 11, 12

N.J.S.A. § 2C:34-7 . . . . . 1, 2, 3, 4

N.J.S.A. § 2C:34-7c 2, 5, 7, 9, 12, 14

RULES

New Jersey Court Rule 2:10-5 . . . . . 1, 10, 12

New Jersey Court Rule 2:11-6 . . . . . 1, 6, 7, 10

No. 98-1089

In the

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October Term, 1998

HAMILTON AMUSEMENT CENTER t/a VIDEO EXPRESS, L.O.J., INC. t/a THE EMPORIUM, PINCO, INC. t/a CAMELOT BOOK STORE, and CRESCENDO BOOKS, INC. t/a CARNIVAL BOOKS,

Petitioners,

v.

PETER VERNIERO, Attorney General for the State of New Jersey and THE STATE OF NEW JERSEY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

Brief and Appendix of the Respondents in Opposition

STATUTES AND OTHER PROVISIONS INVOLVED

In addition to the statutes and other provisions whose text is quoted in the petition, the following provisions are involved: (1) New Jersey Statutes Annotated [hereinafter "N.J.S.A."] § 2C:33-12.2; (2) N.J.S.A. § 2C:34-7; (4) New Jersey Court Rule 2:10-5; and (4) New Jersey Court Rule 2:11-6. The text of these provisions is printed in the appendix at the end of this brief.

STATEMENT OF THE CASE

In 1995, the New Jersey Legislature enacted N.J.S.A. § 2C:34-7, regulating sexually-oriented businesses. Subsection a. of this statute requires dispersal of these businesses by prohibiting their location within 1000 feet of each other or within 1000 feet of certain protected entities. Subsection b. physically isolates these businesses by requiring surrounding perimeter buffers of plantings or other physical dividers impeding the view of the interior of the premises. Subsection c., at issue in this case, regulates signage by prohibiting the display of more than two exterior signs: an "identification sign" (no more than 40 square feet in size) and a sign giving notice that the premises are off limits to minors.

This statute was one part of a two-part legislative "package" regulating sexually-oriented businesses. (App. to Pet. A-21). The second part, a companion bill enacted one month earlier but introduced simultaneously and jointly considered by a legislative committee (see note 1 infra), was N.J.S.A. 2C:33-12.2. Subsection a. of this statute provides a definition of "sexually oriented business" -- the same definition applicable to N.J.S.A. § 2C:34-7. Subsection b. prohibits sexually-oriented businesses from offering patrons closed booths or screens to facilitate sexual activity. Subsection c. authorizes municipalities to determine restrictions on hours of operation.

Shortly after enactment, petitioners, each of which is a sexually-oriented business, commenced this action in a state trial court seeking declaratory and permanent injunctive relief against enforcement of the signage restrictions of N.J.S.A. § 2C:34-7c. Petitioners claimed that the restrictions violate their rights under the First and Fourteenth Amendments to the United States Constitution and corresponding provisions of the New Jersey Constitution. Petitioners also claimed that the phrase "identification sign" is constitutionally vague on its face.

In the trial court respondents introduced legislative history consisting of documents and a speech brought to the legislature's attention and directed to N.J.S.A. § 2C:34-7. Respondents did not introduce legislative history or documents and speeches directed to the companion statute, N.J.S.A. 2C:33-12.2. Respondents argued that the purpose of the signage restrictions was to improve traffic safety and diminish harm to minors. (App. to Pet. A-95 to A-97). The trial court held that the signage restrictions are content-based restrictions on speech that must fall under strict-scrutiny analysis. (App. to Pet. A-97 to A-99). The trial court also concluded that the statute's phrase "identification sign" is unconstitutionally vague. (App. to Pet. A-101). The trial court entered a permanent injunction prohibiting enforcement. (App. to Pet. A-81 to A-82).

Respondents appealed. In their appellate brief, respondents requested the intermediate state-appellate court to expand the appellate record to include legislative matters that respondents did not introduce in the trial court -- documents and speeches brought to the legislature's attention and directed to the companion statute, N.J.S.A. 2C:33-12.2. Respondents argued that expansion of the record would not prejudice petitioners, who were familiar with the new matters that respondents sought to introduce. The new matters had been introduced into the trial-court record in Chez Sez VIII, Inc. v. Poritz, 297 N.J.Super. 331, 688 A.2d 119 (App. Div.), certif. denied, 149 N.J. 409, 694 A.2d 194, cert. denied, --- U.S. ---, 118 S.Ct. 337, 139 L. Ed.2d 262 (1997), a case challenging the constitutionality of the companion statute, N.J.S.A. § 2C:33-12.2, and a case involving the same respondents, the same trial judge, the same lawyers, and some of the same petitioners, who had the opportunity to challenge or refute the accuracy of the new matters in the course of the Chez Sez proceeding. Respondents additionally argued that expansion was appropriate because petitioners relied upon the Chez Sez trial-court opinion in the court below. (Superior

Court of New Jersey, Appellate Division, "Brief on Behalf of Defendants-Appellants," filed August 2, 1996, p. 30 & n.6).

Respondents argued that the new matters that they sought to introduce were relevant to the legislative purpose of the signage restrictions. Respondents argued that in enacting N.J.S.A. 2C:34-7, the legislature was responding to concerns not only about traffic safety and harm to minors, but also about prostitution, crime, juvenile delinquency, deterioration in property values, and lethargy in neighborhood improvement efforts infecting neighborhoods in which sexually-oriented businesses are located. Respondents argued that an additional purpose of N.J.S.A. § 2C:34-7 is physically and psychologically to isolate these businesses from the communities they harm (without otherwise interfering with their internal operation or First Amendment expression) through dispersal, perimeter buffers, and restrictions on the signage that announce their presence in the community. (Superior Court of New Jersey, Appellate Division, "Brief on Behalf of Defendants-Appellants," filed August 2, 1996, pp. 3, 20, 26, 31, 35).

Petitioners opposed respondents' application to expand the appellate record and argued that the new matters should "not be considered by this [intermediate state-appellate court] in determining whether [respondents] met [their] burden in the lower court of establishing" that the legislature regulated signage for the purpose of ameliorating adverse secondary effects. The sole reason advanced in support of their opposition to expansion was that "these documents were not provided to the court below as relevant legislative materials in this action." (Superior Court of New Jersey, Appellate Division, "Brief and Appendix on Behalf of Plaintiffs-Respondents," filed October 3, 1996, p. 17). Under the "arguendo" assumption that the intermediate state-appellate court might grant expansion, petitioners expended several pages of their brief discussing and challenging the applicability of the new matters. (Id. pp. 17 to 21).

The intermediate state-appellate court granted respondents' application and expanded the record to include documents and speeches directed to the companion statute, N.J.S.A. 2C:33-12.2. (App. to Pet. A-69 & n.3; A-70 & n.4). The court concluded that N.J.S.A. 2C:34-7c regulates only commercial speech and applied both commercial-speech analysis and the analysis of City of Renton v. Playtime Theatres, 475 U.S. 41 (1986). (App. to Pet. A-72, A-75). The court upheld N.J.S.A. 2C:34-7c and found that on the expanded legislative record, "objective lawmakers could reasonably conclude that sexually oriented businesses are associated with high crime rates and cause a deterioration in the quality of neighborhood life." (App. to Pet. A-75). "By isolating these businesses through dispersal, perimeter buffers, and signage restrictions," all included in N.J.S.A. 2C:34-7, "the legislature addressed these legitimate concerns while still allowing these businesses to advertise and operate." (App. to Pet. A-75).

As to the vagueness problem alleged by petitioners with respect to the phrase "identification sign," the court gave this phrase a limiting construction which, it concluded, eliminated vagueness. (App. to Pet. A-78 to A-79). The court held that "an identification sign may communicate not only the name of the establishment, but also the street number, operating hours and general nature of the establishment in order to identify the business." (App. to Pet. A-79). The court held that the statute does not prohibit "the posting of temporary political signs." (App. to Pet. A-78 n.6). The court reversed the trial court's judgment imposing restraints.

Petitioners sought review by the Supreme Court of New Jersey. Their "Petition for Certification" argued that the intermediate state-appellate court's limiting construction of the phrase "identification sign" did not cure the vagueness problem, and that the statute was infirm under the First Amendment. The Petition for Certification did not argue that the intermediate state-appellate court erred in expanding the

appellate record. Petitioners' "Reply Petition for Certification" (replying to respondents' brief in opposition to certification) argued that "[i]t was Respondents' duty . . . to prove by evidence before the trial court that the Government had a legitimate and significant interest in regulating adult business signage and that the signage restrictions were narrowly tailored to advance that interest" but failed to state whether this trial-court duty arose from state procedural law or First-Amendment principles. (Supreme Court of New Jersey, Reply Petition for Certification, filed May 9, 1997, pp. 6 to 7).

The Supreme Court of New Jersey granted petitioners' "Petition for Certification" and on July 21, 1998 issued its opinion and judgment in this matter affirming the judgment and reasoning of the intermediate state-appellate court. The opinion articulated a dual, simultaneous analysis under both commercial speech and Renton principles. (App. to Pet. A-12 to A-32). The Court found that the signage restrictions were part of an aggregate legislative enactment regulating sexually-oriented businesses for the purpose of improving traffic safety; limiting harm to minors; and reducing prostitution, crime, juvenile delinquency, deterioration in property values, and lethargy in neighborhood improvement efforts. (App. to Pet. A-22). The Court sustained the limiting construction of the phrase "identification sign" and found that it was not facially vague. (App. to Pet. A-32 to A-40).

On July 31, 1998, petitioners filed a motion for reconsideration pursuant to New Jersey Court Rule 2:11-6. For the first time petitioners argued that it was error to expand the appeliate record to include legislative matters not brought to the trial court's attention. Petitioners claimed that the expansion denied them the ability to challenge or refute the accuracy or applicability of the legislative history of the companion statute, N.J.S.A. § 2C:33-12.2. Petitioners also claimed that expansion contravened First-Amendment principles requiring the government to articulate statutory

purpose and to adduce evidence of purpose in the trial court and not afterwards. (Supreme Court of New Jersey, "Brief and Appendix in Support of Motion for Reconsideration Pursuant to R. 2:11-6," filed July 31, 1998). On October 7, 1998, the Supreme Court of New Jersey denied petitioners' motion for reconsideration. (App. to Pet. A-1).

REASONS FOR DENYING THE WRIT

1. Petitioners' Disputes with the First-Amendment Analysis of the Opinion below Present Two Claims over Which this Court Lacks Jurisdiction And, in Any Event, Present No Questions That Warrant Granting the Writ.

Petitioners' first question presented is whether N.J.S.A. § 2C:34-7c is a content-based restriction on speech invalid under strict-scrutiny analysis. Petitioners fault the Supreme Court of New Jersey for analyzing this question under City of Renton v. Playtime Theatres, 475 U.S. 41 (1986), and petitioners claim that Renton is "inapposite herein" (Pet. 9) because the City of Renton did not attempt to regulate the content of the speech of sexually-oriented businesses whereas the New Jersey statute regulates the content of petitioners' signage.

Petitioners are objecting only to a perceived (but not a real) misapplication of settled law on an issue that seldom arises. Petitioners point to no conflict among lower courts as to whether Renton is applicable to signage restrictions, including restrictions on content, for sexually-oriented businesses. Those few courts that have addressed this issue have uniformly applied Renton to uphold the restrictions when, although literally content-based, the restrictions may be justified without reference to content because they serve a purpose to ameliorate adverse secondary effects. (App. to Pet. A-29 to A-31).

There is no basis for drawing the distinction which, petitioners claim, renders Renton inapposite to signage content-restrictions. Contrary to petitioners' premise, the City of Renton regulated the content of speech in the sense that a business's promulgation of sexually-oriented speech was a predicate to the application of the City's restrictions on where the business could locate. Still, this Court applied content-neutral analysis because of the City's purpose to ameliorate adverse secondary effects. For the same reason, content-neutral analysis is appropriate for the signage restrictions in this case. The restrictions pertain only to signage and not to other advertising or First-Amendment expression.

Petitioners fault the finding of the Supreme Court of New Jersey that the signage restrictions were part of an aggregate legislative enactment regulating sexually-oriented businesses for the purpose of improving traffic safety; limiting harm to minors; and reducing prostitution, crime, juvenile delinquency, deterioration in property values, and lethargy in neighborhood improvement efforts. (App. to Pet. A-22). But this Court does not normally grant the writ to review state-court findings of fact. There was sufficient evidence before the Supreme Court of New Jersey to make these findings. The legislative matters reviewed in the appeal demonstrated that the legislature was apprised that sexually-oriented businesses contribute to prostitution, crime, juvenile delinquency, deterioration in property values, and lethargy in neighborhood improvement efforts. (App. to Pet. A-21 to A-22). Physically and psychologically isolating these businesses from the communities they harm and deterring anonymous on-premises sexual activity in closed booths (without otherwise interfering with the businesses' internal operation or First Amendment expression) through dispersal, perimeter buffers, and closed-booth and signage restrictions (all part of the aggregate legislative enactment) is a rational approach to ameliorating adverse secondary effects. (App. to Pet. A-24 to A-25, A-26).

Petitioners discuss a split of authority as to whether the legislative record must contain pre-enactment evidence of the legislature's intent to ameliorate adverse secondary effects in order for the legislation to be afforded intermediate scrutiny as content-neutral legislation; and as to whether, in the absence of pre-enactment evidence, the government may be afforded the opportunity in court to adduce evidence of adverse secondary effects and the legislation's ameliorative purpose. (Pet. 10 to 11). This split of authority is irrelevant to this case because the findings of the Supreme Court of New Jersey relied upon legislative pre-enactment evidence. (App. to Pet. A-22).

Petitioners' dispute with the findings of the Supreme Court of New Jersey is not that the Court went outside the legislative record. Petitioners' dispute is that the Court went outside the legislative matters presented to the trial court. Petitioners claim that the First Amendment restricted the Supreme Court of New Jersey to the trial-court record. (Pet. 14). Petitioners' second question presented asks whether the First Amendment requires that the findings of the Supreme Court of New Jersey be based upon the trial-court record, rather than upon the expanded appellate record.[1] This Court

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[1] The phrasing of petitioners' second question presented suggests that it may also ask whether matters brought to the legislature's attention in its consideration of the companion statute, N.J.S.A. § 2C:33-12.2, may be utilized to discern legislative intent in the signage restrictions of N.J.S.A. § 2C:34-7c (even if respondents had brought these matters and the companion statute to the attention of the trial court). This question is neither interesting nor important. Both statutes have a common legislative history, both were introduced as bills into the legislature within one week of each other, both proceeded simultaneously through the legislature, the sponsors engaged in cooperative efforts to obtain amendments to make both bills consistent with each other, both were reviewed on the same day in a single legislative committee hearing, both use the same definition of "sexually oriented business," and both regulate sexually-oriented businesses. (Superior Court of New Jersey, Appellate Division, "Brief on

lacks jurisdiction to resolve this question because the Supreme Court of New Jersey did not decide it; because petitioners did not timely ask that it be decided; and because an independent and adequate state-law ground supports the expansion.

New Jersey Court Rule 2:10-5 allows an appellate court, including the Supreme Court of New Jersey, to exercise "such original jurisdiction as is necessary to the complete determination of any matter on review." Expansion of the appellate record to consider legislative matters outside the trial-court record was an appropriate application of this Rule, which therefore provides an independent and adequate state-law ground for the expansion inasmuch as petitioners did not timely advise the Supreme Court of New Jersey (or the intermediate state-state-appellate court) that, and did not timely request the court to decide whether, expansion violated their First-Amendment rights.

Petitioners first claimed a First-Amendment violation arising from the expansion in their motion for reconsideration filed July 31, 1998, ten days after the Supreme Court of New Jersey issued its opinion in this matter. A motion for reconsideration pursuant to New Jersey Court Rule 2:11-6 is not favored under state law and is not an adequate method for preserving claims not previously made in the course of state appellate proceedings. A motion for reconsideration does not compel the appellate court to resolve issues not previously raised; at most, the matter lies in the discretion of the court, which normally displays its interest in the motion by issuing

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Behalf of Defendants-Appellants," dated August 2, 1996, pp. 29 to 32). Discernment of legislative purpose often requires consideration of statutes touching upon similar subject matters and having far less inter-connection than these statutes. That a sponsor or interested citizen may have spoken about or submitted materials on behalf of only one of these statutes hardly foreclosed members of the legislature from considering the speech or the materials submitted in the context of both statutes. Nothing in the First Amendment forecloses joint consideration.

a request for an answer from the movant's opponent (in the absence of which the Rule does not allow the opponent to answer). The Supreme Court of New Jersey denied petitioners' motion for reconsideration (App. to Pet. A-1) without requesting an answer from respondents.

The second question presented raises an unusual, virtually unique fact pattern unlikely to arise again. The second question presented lacks merit and importance. The First Amendment says nothing about state-court procedure in this context. State-court procedure is normally a matter of state law. As a matter of state law, the intermediate state-appellate court and the Supreme Court of New Jersey might have restricted respondents to the trial-court record, but nothing in the First Amendment impacted upon state-court procedure to foreclose the Supreme Court of New Jersey (or the intermediate state-appellate court) from expanding the appellate record to take judicial notice of legislative matters not brought to the trial court's attention. So long as that notice helped to sustain the content-neutrality of the statute under review, the First Amendment demanded nothing more.

Petitioners claim that expansion of the appellate record denied them "the ability to challenge or refute the accuracy or applicability of [the] legislative history" of the companion statute, N.J.S.A. § 2C:33-12.2. (Pet. 7). This claim lacks merit. Petitioners had this ability and expended several pages of their intermediate state-appellate court brief discussing and challenging the applicability of this legislative history. (Superior Court of New Jersey, Appellate Division, "Brief and Appendix on Behalf of Plaintiffs-Respondents," filed October 3, 1996, pages 17 to 21). Moreover, this legislative history was part of the trial-court record in Chez Sez VIII, Inc. v. Poritz, 297 N.J.Super. 331, 688 A.2d 119, certif. denied, 149 N.J. 409, 694 A.2d 194, cert. denied, --- U.S. ---, 118 S.Ct. 337, 139 L. Ed 2d 262 (1997), a case challenging the constitutionality of the companion statute,

N.J.S.A. § 2C:33-12.2, and a case involving the same defendants, the same lawyers, the same trial judge, and -- most importantly -- some of the same petitioners as this case, who had opportunity, ability and motivation to challenge or refute the accuracy of that history in the course of that proceeding.

The claim that expansion of the appellate record denied petitioners the ability to challenge or refute the accuracy or applicability of the legislative history of the companion statute, N.J.S.A. § 2C:33-12.2, raises notice due-process concerns rather than First-Amendment issues. This claim was not preserved in the state-court proceedings below since it too was first raised in petitioners' post-opinion motion for reconsideration filed July 31, 1998. Neither the intermediate state-appellate court nor the Supreme Court of New Jersey adjudicated this claim. Not having been decided below, not having been preserved below, and preempted by an independent and adequate state-law ground (the expansion authority afforded by New Jersey Court Rule 2:10-5), the claim is outside of this Court's jurisdiction.

Petitioners' third and fourth questions presented raise issues about the commercial-speech analysis of the Supreme Court of New Jersey.[2] Petitioners' arguments supporting these questions, like their Renton analysis, partially rests upon

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[2] In their commercial-speech argument, petitioners submit that N.J.S.A. § 2C:34-7c is not narrowly tailored because it imposes a state-wide solution for a problem that is essentially a local, municipal zoning problem. (Pet. 22 to 23). This argument, relevant to the Renton analysis as well, was properly rejected by the Supreme Court of New Jersey (App. to Pet. A-31 to A-32) and is easily dismissed with the observation that signage for sexually-oriented businesses is visible across municipal boundaries and thus harmful to adjacent municipalities that have no zoning control over it. Likewise, the deleterious effects of sexually-oriented businesses (and the signage that advertise and announce their presence) are often not restricted to a single municipality.

their mistaken claim -- over which this Court lacks jurisdiction -- that the First Amendment forecloses judicial notice by a state appellate court of matters not brought to the trial court's attention. (Pet. 20). But more broadly, petitioners discuss dissatisfaction with the commercial-speech doctrine expressed by members of this Court and commentators as well, some of whom have proposed abandonment of the doctrine. (Pet. 15 to 18). Petitioners urge that the writ be granted to afford general review of the doctrine.

Several cases percolating through the appellate process, including United Reporting Pub. Corp. v. California Highway Patrol, 146 F.3d 1133 (9th Cir. 1998), cert. granted --- U.S. ---, 1999 WL 24679, 67 U.S.L.W. 3302, 67 U.S.L.W. 3342, 67 U.S.L.W. 3464, 67 U.S.L.W. 3468 (U.S. Jan. 25, 1999), and Greater New Orleans Broadcasting Ass'n v. U.S., 149 F.3d 334 (5th Cir. 1998), cert. granted --- U.S. ---, 1999 WL 13527, 67 U.S.L.W. 3191, 67 U.S.L.W. 3449, 67 U.S.L.W. 3456 (U.S. Jan. 15, 1999), will provide this Court appropriate opportunities to revise or abandon the commercial-speech doctrine. But this case is not an appropriate vehicle. The opinion of the Supreme Court of New Jersey carefully articulated a dual, simultaneous analysis under both commercial speech and Renton principles. (App. to Pet. A-12 to A-32). Unlike the commercial-speech doctrine, Renton is not under attack. On the contrary, commentators urging abolition of the commercial-speech doctrine argue that traditional analysis is adequate for resolution of commercial-speech issues (Pet. 17), and the analysis employed in Renton is traditional.

Respondents will prevail under the Renton analysis even if this Court were to grant the writ and revise the traditional commercial-speech analysis employed by the Supreme Court of New Jersey in the opinion below. Thus, revision of the commercial-speech doctrine as applied to this case would be

mere dicta irrelevant to the outcome. The writ should be denied for this reason.

2. Petitioners' Disputes with the Vagueness Analysis of the Opinion below Present No Question That Warrants Granting the Writ.

Petitioners' fifth question presented is whether the phrase "identification sign" as used in N.J.S.A. § 2C:34-7c and as construed by the Supreme Court of New Jersey (affirming the interpretation of the intermediate state-appellate court) is unconstitutionally vague and prevents them from understanding what type of exterior "identification sign" they may post. This fifth question presented is not recurring, is not the subject of conflicting opinions among courts from several jurisdictions (indeed, is the subject of only the opinion below), and is not of general interest or general importance. In disputing the analysis of the opinion below, petitioners are objecting only to (their perceived) misapplication of settled law. Petitioners advance no reason -- and none is apparent -- for which this case presents an appropriate vehicle for re-visiting well-settled law on this subject.

Petitioners err to argue that the phrase "identification sign" is unconstitutionally vague. In the courts below, petitioners mounted a facial, rather than an "as applied" challenge to this statute. (App. to Pet. A-33). But unquestionably, petitioners can conform their conduct (their signage) to the requirements of the statute. There exist signs that, without doubt, are "identification signs" as construed by the opinion below. For most cases, the question whether the signage is proscribed will be readily answerable, and "to the extent that an area of doubt exists, [there is] no reason why the [restrictions] are not 'readily subject to [further] narrowing construction by the state courts.'" Young v. American Mini Theatres Inc, 427 U.S. 50, 61 (1976) (quoting from Erznoznik v. City of Jacksonville, 422 U.S. 205, 216

(1975)). See also City of Renton v. Playtime Theatres, 475 U.S. 41, 55 n.4 (1986).

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Dated: February 19, 1999

APPENDIX

APPENDIX TO THE BRIEF OF THE RESPONDENTS IN OPPOSITION

The text of statutes and other provisions involved in this case (other than those quoted in the petition) is as follows:

N.J.S.A. § 2C:33-12.2

a. As used in this act:

(1) "Sexually oriented business" means:

(a) A commercial establishment which as one of its principal business purposes offers for sale, rental, or display any of the following:

Books, magazines, periodicals or other printed material, or photographs, films, motion pictures, video cassettes, slides or other visual representations which depict or describe a "specified sexual activity" or "specified anatomical area"; or still or motion picture machines, projectors or other image- producing devices which show images to one person per machine at any one time, and whether the images so displayed are characterized by the depiction of a "specified sexual activity" or "specified anatomical area"; or instruments, devices, or paraphernalia which are designed for use in connection with a "specified sexual activity"; or

(b) A commercial establishment which regularly features live performances characterized by the exposure of a "specified anatomical area" or by a "specified sexual activity," or which regularly shows films, motion pictures, video cassettes, slides, or other photographic representations which depict or describe a "specified sexual activity" or "specified anatomical area";

(2) "Person" means an individual, proprietorship, partnership, corporation, association, or other legal entity.

(3) "Specified anatomical area" means:

(a) Less than completely and opaquely covered human genitals, pubic region, buttock or female breasts below a point immediately above the top of the areola; or

(b) Human male genitals in a discernibly turgid state, even if covered.

(4) "Specified sexual activity" means:

(a) The fondling or other erotic touching of covered or uncovered human genitals, pubic region, buttock or female breast; or

(b) Any actual or simulated act of human masturbation, sexual intercourse or deviate sexual intercourse.

b. In addition to any activities proscribed by the provisions of N.J.S. 2C:33-12, a person is guilty of maintaining a nuisance when the person owns or operates a sexually oriented business which offers for public use booths, screens, enclosures or other devices which facilitate sexual activity by patrons.

c. Notwithstanding any other provision of law, a municipality shall have the power to determine restrictions, if any, on the hours of operation of sexually oriented businesses.

d. A person who violates this act is guilty of a crime of the fourth degree.

N.J.S.A. § 2C:34-7

a. Except as provided in a municipal zoning ordinance adopted pursuant to N.J.S. 2C:34-2, no person shall operate a sexually oriented business within 1,000 feet of any existing sexually oriented business, or any church, synagogue, temple or other place of public worship, or any elementary or secondary school or any school bus stop, or any municipal or county playground or place of public resort and recreation, or within 1,000 feet of any area zoned for residential use. This subsection shall not apply to a sexually oriented business already lawfully operating on the effective date of this act where another sexually oriented business, an elementary or secondary school or school bus stop, or any municipal or county playground or place of public resort and recreation is subsequently established within 1,000 feet, or a residential district or residential lot is subsequently established within 1,000 feet.

b. Every sexually oriented business shall be surrounded by a perimeter buffer of at least 50 feet in width with plantings, fence, or other physical divider along the outside of the perimeter sufficient to impede the view of the interior of the premises in which the business is located. The municipality may, by ordinance, require the perimeter buffer to meet additional requirements or standards. This subsection shall not apply to a sexually oriented business already lawfully operating on the effective date of this act.

c. No sexually oriented business shall display more than two exterior signs, consisting of one identification sign and one sign giving notice that the premises are off limits to minors. The identification sign shall be no more than 40 square feet in size.

d. A person who violates this section is guilty of a crime of the fourth degree.

New Jersey Court Rule 2:10-5

The appellate court may exercise such original jurisdiction as is necessary to the complete determination of any matter on review.

New Jersey Court Rule 2:11-6 (as it existed prior to the amendment that became effective September 1, 1998)

(a) Service; Filing; Contents; Argument. Within 10 days after entry of judgment, unless such time is enlarged by court order, a party may apply for reconsideration by serving 2 copies of a motion on counsel for each of the opposing parties and filing 9 copies thereof with the Supreme Court, or 5 copies thereof with the Appellate Division, as appropriate. One filed copy shall be signed by counsel. The motion shall not exceed 25 pages and shall contain a brief statement and argument of the ground relied upon and a certificate of counsel that it is submitted in good faith and not for purposes of delay. An answer shall be filed only if requested by the court, and within 10 days after such request or within such other time as the court fixes therein. The motion will not be argued orally.

(b) Grant of Motion. A motion for reconsideration will be granted only if it is moved by a justice or judge who concurred in the judgment or decision, and a majority of the court so determines. It may be granted in whole or in part, and on terms. Unless otherwise ordered by the court, the motioning party shall be regarded as the appellant on reconsideration and shall file a brief within 30 days of the entry of the order granting the

reconsideration. Thereafter the same procedures shall be followed as are provided for an original appeal.

(c) Determination of Appeal. The court may, where appropriate, summarily redetermine the appeal or amend its opinion.

[Paragraph (a) of this Rule was amended July 10, 1998 to be effective September 1, 1998. The amendment requires that the motion for reconsideration have annexed a copy of the opinion and any separate judgment or order that is the subject of the motion. Petitioners' motion for reconsideration predated the effective date of this amendment, although petitioners' motion complied with the obligation that it had not yet imposed.]

Supreme Court, U.S.
FILED
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No. 98-1089

In The

Supreme Court of the United States

October Term, 1998

HAMILTON AMUSEMENT CENTER t/a VIDEO EXPRESS,
L.O.J., INC. t/a THE EMPORIUM,
PINCO, INC. t/a CAMELOT BOOK STORE, and
CRESCENDO BOOKS, INC. t/a CARNIVAL BOOKS,

Petitioners,

vs.

PETER VERNIERO, Attorney General for the State of New Jersey
and THE STATE OF NEW JERSEY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF NEW JERSEY

REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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16pp

PARENT AND SUBSIDIARY COMPANIES

Petitioners have no parent or subsidiary companies to be listed pursuant to Rule 29.6 of the Rules of this Court.

TABLE OF CONTENTS

Page

PARENT AND SUBSIDIARY COMPANIES i

TABLE OF CONTENTS ii

TABLE OF CITED AUTHORITIES iii

ARGUMENT

I. THE STATE FAILED TO DEMONSTRATE THE REQUISITE SUBSTANTIAL GOVERNMENTAL INTEREST IN ITS SIGNAGE STATUTE'S RESTRICTIONS ON SPEECH IN ITS LEGISLATURE OR THE TRIAL COURT 1

II. THIS CASE IS AN APPROPRIATE VEHICLE FOR DETERMINING WHETHER COMMERCIAL SPEECH IS ENTITLED TO FULL FIRST AMENDMENT PROTECTION 6

III. THE SUBJECT NEW JERSEY STATUTE IS IMPERMISSIBLY VAGUE 9

CONCLUSION 10

APPENDIX

Text of New Jersey Court Rule 2:12-11 . . . . . A-1

TABLE OF AUTHORITIES

CASES Page

Central Hudson Gas & Electric Corp. v. Public Service Com'n., 447 U.S. 557 (1980) 6, 8

Chez Sez VIII, Inc. v. Poritz, 297 N.J. Super. 331, 688 A.2d 119, certif. denied, 149 N.J. 409, 694 A.2d 194, cert. denied, -- U.S. --, 118 S.Ct. 337 (1997) 6

City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986) 1, 2, 3, 4, 5, 6, 8, 9, 10

Coates v. Cincinnati, 402 U.S. 611 (1971) 9

Greater New Orleans Broadcasting Association v. United States, 149 F.3d 334 (5th Cir. 1998), cert. granted, 67 U.S.L.W. 3456 (January 15, 1999) 7

Phillips v. Borough of Keyport, 107 F.3d 164 (3d Cir.) (en banc), cert. denied, -- U.S. --, 118 S.Ct. 336 1

Reno v. American Civil Liberties Union, -- U.S. --, 117 S.Ct. 2329 (1997) 9

Sable Communications of California, Inc. v. F.C.C., 492 U.S. 115 (1989) 1

Turner Broadcasting System, Inc.
v. F.C.C., 512 U.S. 622 (1994) 8

United Reporting Pub. Corp. v. California
Highway Patrol, 146 F.3d 1133 (9th Cir. 1998),
cert. granted, 67 U.S.L.W. 3468
(January 25, 1999) 7

CONSTITUTIONS

United States Constitution,
First Amendment 1, 3, 4, 5, 6, 7, 9

STATUTES

N.J.S.A. 2C:33-12.2 . . . . . 2, 4, 5, 6

N.J.S.A. 2C:34-7c 1, 2, 5, 6, 9

RULES

New Jersey Court Rule 2:10-5 5

New Jersey Court Rule 2:12-11 . . . . . 3, 4

POINT I

THE STATE FAILED TO DEMONSTRATE THE REQUISITE SUBSTANTIAL GOVERNMENTAL INTEREST IN ITS SIGNAGE STATUTE'S RESTRICTIONS ON SPEECH IN ITS LEGISLATURE OR THE TRIAL COURT.

Petitioners argued in their Petition for Certiorari [the "Petition"] that the subject adult sign ordinance, New Jersey Statutes Annotated ["N.J.S.A."] 2C:34-7c, is a content-based restriction on non-obscene speech which must be subject to strict scrutiny analysis. As such, it could only be sustained by a compelling state interest using the least restrictive means.[1] However, even if the statute was found to be content-neutral, under City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986), the State would still be required to demonstrate, at a minimum, a substantial governmental interest in its restrictions (475 U.S. at 50).

Petitioners assert that in the First Amendment arena, Renton specifically requires that proof of a substantial governmental interest be made by evidence submitted to and relied upon the legislature itself in enacting the statute (475 U.S. at 51-52). Notwithstanding this Court's direction, some lower courts have nevertheless allowed the requisite evidentiary submission to be made in the trial court in the first instance, rather than in the legislature pre-enactment. Phillips v. Borough of Keyport, 107 F.3d 164, 178 (3d Cir.) (en banc), cert. denied, -- U.S. --, 118 S.Ct. 336 (1997). This creates a significant conflict which should be resolved

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[1]See, e.g., Sable Communications of California, Inc. v. F.C.C., 492 U.S. 115, 126 (1989).

by this Court. However, petitioners are unaware of, and respondents do not cite, other authority setting a new standard, allowing evidence of a substantial governmental interest to be introduced for the first time at the appellate court level.

Here, insufficient evidentiary justification for the State's restrictions on the exterior signage of sexually oriented businesses was introduced before the legislature in enacting N.J.S.A. 2C:34-7c. As recognized by the State Supreme Court, unlike the city in Renton, the New Jersey legislature did not place in the Record any studies showing the purported secondary effects of adult businesses; nor is there evidence it relied on any such studies or court decisions (A-17). Rather, the only pre-enactment legislative evidence was a position report by the Concerned Women for America which did not address signage, traffic safety or minors (A-19 to A-20); and a diatribe by the statute's sponsor attacking adult businesses as "perverted establishments" with "sordid activities" (A-55), without offering evidentiary support for her conclusions (A-20).

Ultimately, the State was permitted by the Appellate Division to supplement its Record in an attempt to articulate a substantial interest in restricting speech by adding the legislative history of N.J.S.A. 2C:33-12.2, a separate companion statute (A-21; Resp. Brief, p.2). Respondents failed to introduce this additional material in the trial court (Resp. Brief, p.3), which would have provided petitioners the opportunity for adversarial review. Rather, they were permitted to "expand the appellate record" (Resp. Brief, p.3). Thus, respondents first submitted this legislative history of a separate statute to the intermediate appellate court (A-21;

Resp. Brief, p.5); the State Supreme Court similarly took judicial notice thereof (A-21).

Petitioners have strenuously argued in their Petition that respondents did not come close to establishing evidentiary support for their restrictions on speech, either pre-enactment before the legislature, or later in the trial court, as required by Renton and First Amendment jurisprudence (Petition, pp.9-14). Respondents, however, mistakenly contend that this argument is foreclosed because petitioners failed to assert it before the State Supreme Court until they moved for reconsideration after that court's decision (Resp. Brief, pp.6, 10). That contention is based upon an erroneous reading of the New Jersey Court Rules.

Respondents concede that petitioners devoted several pages of their Appellate Division Brief to protesting the "expansion of the appellate record" (Resp. Brief, p.11). Of course, such an argument in a brief, though on First Amendment grounds, is not the same as their being able to refute the additional material at an adversarial hearing in the trial court. Nevertheless, the argument against augmentation of the Record clearly was made by petitioners before the Appellate Division.

After they were unsuccessful in the intermediate appellate court, petitioners obtained certification of their appeal in the State Supreme Court. Under New Jersey Court Rule 2:12-11, an appeal to the State Supreme Court normally is "submitted on the briefs, appendices and transcript filed

with the Appellate Division" below.[2] Thus, contrary to respondents' surprising contention that petitioners first raised this issue on their motion for reconsideration (Resp. Brief, pp. 6, 10), petitioners' attack on the expansion of the appellate Record to include matters not in front of the trial court was clearly before the State Supreme Court prior to its decision sought to be reviewed herein. This is further evidenced by the opinion of that court discussing and accepting the expansion of the Record to include the legislative history of N.J.S.A. 2C:33-12.2 (A-21 to A-22).

Respondents attempt to attack petitioners' asserted questioning of Renton's applicability in this case (Resp. Brief, pp.7-8). That attempt is surprising. Petitioners do not question the general applicability of Renton in a First Amendment context. However, they do note that factually Renton dealt with locational restrictions on adult businesses, not an attempt to regulate the content of speech. The instant statute, to the contrary, does not restrict the location of adult-oriented businesses, but instead directly regulates the contents of their exterior signage.

Next, respondents raise the counterfeit argument that petitioners are attacking the factual findings of the State Supreme Court that a sufficient evidentiary showing was made to justify the State's restrictions on speech (Resp. Brief, pp.8-9). That contention is a straw man.

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[2]The full text of New Jersey Court Rule 2:12-11 is reproduced in the Appendix to this Reply Brief. In fact, petitioners motion to submit a further Brief to the State Supreme Court was denied.

While petitioners certainly dispute that respondents have demonstrated a substantial governmental interest within the Renton mandate, that is clearly not the thrust of their argument. Rather, petitioners assert that in the context of a restriction on their speech, the First Amendment requires that the State legislature had evidentiary support therefor prior to enactment of N.J.S.A. 2C:34-7c -- or that this was at least demonstrated before the trial court herein. That unquestionably did not occur (A-21).

Instead, respondents attempt to make a belated showing that the State Supreme Court itself relied upon "legislative pre-enactment evidence" (Resp. Brief, p.9). Petitioners maintain that any such factual reliance by the State's highest court is irrelevant; Renton requires reliance by the legislature itself (475 U.S. at 51-52).[3] In any event, such evidence must concern the signage statute in issue (N.J.S.A. 2C:34-7c), not the legislative history of a "related" but independent statute (N.J.S.A. 2C:33-12.2), as here (A-21).

Respondents' final argument on this issue is that as an independent ground under state law, the New Jersey appellate courts have the right to expand the appellate Record to consider legislative matters outside the trial court Record via New Jersey Court Rule 2:10-5 (Resp. Brief, pp.10-11). This argument similarly fails.

If we were here considering a matter solely under New Jersey law, that State's internal procedural rules would

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[3]Respondents concede the existence of a split in authority as to whether Renton requires pre-enactment evidence of a substantial governmental interest (Resp. Brief, p.9).

govern. However, in this instance we are concerned with the requirements of the First Amendment to the United States Constitution. As bindingly construed by this Court in Renton, in restricting petitioners' speech New Jersey was required to rely upon evidence of a substantial governmental interest pre-enactment before the legislature (475 U.S. at 51-52), and certainly not for the first time before its appellate courts after failing to introduce it at trial.

Moreover, that the legislative history of the "companion statute," N.J.S.A. 2C:33-12.2, may have been introduced before the trial court in Chez Sez VIII, Inc. v. Poritz, 297 N.J.Super 331, 688 A2d 119, certif. denied, 149 N.J. 409, 694 A2d 194, cert. denied, -- U.S. --, 118 S.Ct. 337 (1997) [Resp. Brief, p.11], is of no moment. This case concerns only the validity of N.J.S.A. 2C:34-7c.

POINT II

THIS CASE IS AN APPROPRIATE VEHICLE FOR DETERMINING WHETHER COMMERCIAL SPEECH IS ENTITLED TO FULL FIRST AMENDMENT PROTECTION.

It was previously demonstrated in Point II of the Petition that there is substantial controversy concerning the current status of protection for commercial speech arising from the Court's jurisprudence. While Central Hudson Gas & Elec. Corp. v. Public Service Com'n., 447 U.S. 557 (1980), and its "intermediate scrutiny" test remain current law, the rationale of that decision has been questioned by lower courts and commentators, as well as numerous Justices of this Court (Petition, pp.16-18).

As recognized by respondents (Brief, p.13), this Term two circuit court decisions applying the "commercial-speech doctrine" and intermediate level scrutiny have had petitions for certiorari granted. United Reporting Pub. Corp. v. California Highway Patrol, 146 F.3d 1133 (9th Cir. 1998), cert. granted, 67 U.S.L.W. 3468 (January 25, 1999); Greater New Orleans Broadcasting Ass'n v. United States, 149 F.3d 334 (5th Cir. 1998), cert. granted, 67 U.S.L.W. 3456 (January 15, 1999). Respondents argue that those cases are sufficient to allow the Court to abandon or revise the doctrine if it will (Resp. Brief, p.13).

Respondents' argument is unpersuasive. The fact that in the last two months two cases concerning commercial speech and the First Amendment have already been deemed of sufficient import to be granted plenary review by this Court underscores the national significance of this issue. The instant case, questioning whether a state's restrictions on the contents of exterior signage merely because of the adult-content of the underlying business may survive, is of national significance as well.

Further, as reported in the United States Law Week, neither the United Reporting[4] nor the Greater New Orleans[5]

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[4]"Question presented: Does government violate First Amendment when it releases arrestees' and crime victims' records but forbids their commercial use?" (67 U.S.L.W. at 3342)

[5]"Question presented: May federal government, consistent with First Amendment, undertake to suppress lawful casino gaming by banning truthful, nonmisleading broadcast advertising for such gaming?" (67 U.S.L.W. at

cases present a question expressly examining the applicability of intermediate scrutiny for truthful commercial speech, as does the instant Petition (p.i).

Respondents contend that this case is of lesser importance because the State Supreme Court relied upon both Renton and commercial speech analysis (Resp. Brief, p.13), and that Renton is not under attack. However, the State Supreme Court made clear that it was relying on the Central Hudson limited protection analysis for commercial speech (A-11 to A-13). If this Court should now determine that full First Amendment protection is warranted for commercial speech, then an exacting strict scrutiny analysis would be required. See, e.g., Turner Broadcasting System, Inc. v. F.C.C., 512 U.S. 622, 642 (1994). In such instance, the New Jersey signage statute should be stricken, or at a minimum, the matter remanded to the State Supreme Court for a proper analysis.[6]

Moreover, with regard to Renton, the signage statute's sponsor specifically indicated a concern about children being exposed to adult businesses and their "sordid activities" (A-19 to A-20). To the extent the purpose of the signage restrictions on speech is to insulate minors from the primary effects of adult entertainment, then like the Communications Decency Act, it would be content-based and subject to full strict scrutiny analysis, rather than an analysis

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3449)

[6]Alternatively, the Court may choose to delay its decision on the instant Petition for Certiorari until it can decide the pending commercial speech cases for which it has already granted review this Term.

under Renton. Reno v. American Civil Liberties Union, -- U.S. --, 117 S.Ct. 2329, 2342-43 (1997).

POINT III

THE SUBJECT NEW JERSEY STATUTE IS IMPERMISSIBLY VAGUE.

It is uncontrovertible that under the First Amendment a statute -- and especially one with criminal penalties, as here -- must not be so vague that an average person cannot discern its meaning. Coates v. Cincinnati, 402 U.S. 611 (1971). The subject ordinance, N.J.S.A. 2C:34-7c, allows adult-oriented businesses to post one "identification" sign. Apparently recognizing the constitutional infirmity of such a law, the state courts have attempted a salvage operation using "judicial surgery" (A-36). Thus, although the statute itself contains no such guidance, the courts below held that such a sign may lawfully include the business' name, street address, phone number, hours of operation, and the nature of its activities (A-37, A-79). No direction is given, however, as to whether a specific designation of items sold may be set forth, or a picture or logo design used on the sign.

Respondents argue that petitioners have been given enough guidance to conform their conduct to the statute (Resp. Brief, p.14). However, violation of the statute carries criminal sanctions, and petitioners violate the legislation at their peril. This can only lead to an "increased deterrent effect," and the "'risk of discriminatory enforcement of vague regulations'" by local police. Reno v. American Civil Liberties Union, -- U.S. --, 117 S.Ct. 2329, 2345 (1997).

The state courts' attempts to save the subject vague signage restrictions should not be allowed.

CONCLUSION

This Court should not condone the State's attempts to evade the Renton requirement that to restrict speech, evidence of a substantial governmental interest therein must be presented to the legislature pre-enactment. Further, full strict scrutiny analysis should be applied to restrictions on commercial, as well as political, speech.

For the foregoing reasons, and as previously set forth, petitioners request that the Court grant their Petition for a Writ of Certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX TO THE PETITIONERS' REPLY BRIEF

New Jersey Court Rule 2:12-11

> If certification is granted, the matter shall be deemed pending on appeal in the Supreme Court and the petitioner's entire case shall be before the Supreme Court for review unless the Supreme Court otherwise orders on its own motion or on the motion of a party which shall be included in the petition or in the respondent's brief in answer thereto. The respondent may seek affirmative relief only by cross petition for certification. Further proceedings shall be had as provided for on appeals as of right, except that the appeal shall be submitted on the briefs, appendices and transcript filed with the Appellate Division and except that, in appropriate cases, the Supreme Court may render a decision without argument. Further briefs on the appeal may be filed only on order and in accordance with the schedule set forth therein. Application for permission to file further briefs shall be in the form of a motion.